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THE
PRACTICE
OF
1625.
THE SUPERIOR COURTS OF LAW,
IN
PERSONAL ACTIONS,
AND
EJECTMENT,
ETC.;

SO FAR AS IT IS ALTERED, OR AFFECTED BY THE LATE STATUTES

FOR THE AMENDMENT OF THE LAW, ETC.

AND THE RULES OF COURT, AND DECISIONS THEREON:

ARRANGED IN THE ORDER OF THE NINTH EDITION

OF
TIDD'S PRACTICE:

WITH AN

APPENDIX

OF STATUTES, RULES OF COURT, AND PRACTICAL FORMS;

AND A

COPIOUS ANALYTICAL INDEX.



By **WILLIAM TIDD, Esq.**

OF THE INNER TEMPLE, BARRISTER AT LAW.

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1833.

G. WOODFALL, ANGEL COURT, SKINNER STREET, LONDON.

TO
THE HONORABLE
SIR JOHN BAYLEY, KNT.

ONE OF THE BARONS
OF
HIS MAJESTY'S EXCHEQUER,
ETC. ETC. ETC.

THIS WORK IS DEDICATED;

WITH

THE HIGHEST RESPECT

FOR THOSE GREAT TALENTS,

AND

THAT UNIFORM INTEGRITY OF CONDUCT,

WHICH

HAVE SO LONG AND EMINENTLY DISTINGUISHED HIM

AT THE BAR, AND ON THE BENCH;

AND

WITH THE MOST SINCERE ESTEEM

FOR THOSE VIRTUES,

WHICH

ADORN HIS CHARACTER IN PRIVATE LIFE.

ADVERTISEMENT.

IN consequence of the several Acts of Parliament, Rules of Court, and judicial decisions, on practical subjects, since the publication of the *Ninth* Edition of "the Practice of the Courts of King's Bench, &c." in *Trinity* Term 1828, three Supplements to that work have already been published by the Author: The first, which was brought out in *Michaelmas* term 1830, contained all the Statutes, Rules of Court, and decided Cases, to that time; particularly the Act for the more effectual Administration of Justice, in *England* and *Wales*; and also a practical Treatise on the *Tender* of Money, and the Law relating to *Fees* of Officers of the Courts, &c. The second Supplement, which appeared in *Hilary* Vacation 1832, contained the General Rules of the Courts, since the Administration of Justice Act; with introductory Statements of the Practice, as it existed before, and was affected by those Rules; and the third Supplement, which was published in *November* following, was confined to the Act for Uniformity of Process in personal actions, in his Majesty's Courts of Law at *Westminster*; with the General Rules made by the Judges, in pursuance thereof; and an *Appendix* of Practical Forms. But, besides the Administration of Justice, and Uniformity of Process Acts, other Acts of Parliament have been passed, within the last *three* years

which have made considerable changes in the Law, and Practice of the superior Courts: viz. the 1 W. IV. c. 7, "for the more speedy Judgment and Execution, in Actions brought in his Majesty's Courts of Law at *Westminster*;" 1 W. IV. c. 21, "to improve the Proceedings in *Prohibition*, and on writs of *Mandamus*;" 1 W. IV. c. 22, "to enable Courts of Law to order the Examination of Witnesses, upon Interrogatories and otherwise;" 1 & 2 W. IV. c. 58, "to enable Courts of Law to give relief against Adverse Claims, made upon persons having no interest in the subject of such claims;" 2 & 3 W. IV. c. 71, "for shortening the Time of Prescriptions, in certain cases;" 2 & 3 W. IV. c. 100, "for shortening the Time required in Claims of *Modus decimandi*, or Exemption from, or Discharge of Tithes;" 3 & 4 W. IV. c. 27, "for the Limitation of Actions and Suits, relating to Real Property, and for simplifying the Remedies for trying Rights thereto;" 3 & 4 W. IV. c. 42, "for the further Amendment of the Law, and the better Advancement of Justice;" and 3 & 4 W. IV. c. 67, for the Amendment of the Uniformity of Process act.^a

To point out the alterations and improvements of the Practice, by the several Statutes which have been passed since the Administration of Justice act, is the object of the present publication; wherein it is intended to exhibit the Practice of the superior Courts of Law, in personal actions, and *ejectment*, &c. so far as it is altered or affected by those statutes, and the rules of court, and decisions thereon: And as the last Supplement, on the Uniformity of Process act, is nearly out of print, it has been thought right to incorporate

^a There are also some other recent acts of parliament, which are incidentally noticed, and referred to in the following work; such as Lord *Tenterden's* acts, 9 Geo. IV. c. 14, requiring a written *memorandum*, to take a case out of the statute of limitations, &c.; and c. 15, for amending *Variances*; 11 Geo. IV. & 1 W.

IV. c. 43, as to *Commissions* for taking *Affidavits*, &c.; c. 68, relating to *Common Carriers*; 1 & 2 W. IV. c. 35, for the Appropriation of Fees; 2 & 3 W. IV. c. 118, respecting the Appointment of Officers, in the Exchequer; and 3 & 4 W. IV. c. 98, to legalize a *Tender* in Bank Notes, &c.

its contents in the following work ; wherein they are divided into six chapters, under the following heads : 1. The means of commencing *personal* Actions, in the superior Courts of Law at *Westminster* ; and the Process therein, by writ of Summons and *Distringas*, and the service and execution of such process ; 2. The writ of *capias*, and execution thereof, and process of outlawry ; 3. Appearance, and Special Bail ; 4. Proceedings against the *Sheriff*, to compel him to return the Writ, and bring in the Body ; 5. Proceedings in Actions against *Prisoners*, in custody of the Sheriff, &c. and of the Marshal of the King's Bench, or Warden of the *Fleet* prison ; and 6. The Declaration.

The arrangement of the work will be seen in the Table of Contents. To each enactment, there is an introductory Statement of the Law, as it formerly stood : and References are made throughout, to the *ninth* edition of the Practice, in order to shew the connexion between that work, and the new, or additional matter contained in the present.

An *Appendix* is added, containing such of the Acts of Parliament, as are not fully set forth in the body of the work, with the Rules of Court which have been made on the Uniformity of Process act, &c. and nearly two hundred Practical Forms, consisting chiefly of Writs and Returns, Entries of Process, &c. *Affidavits*, Rules of Court, Judge's Orders, Notices, &c. A *Table* of these Forms is prefixed to the work ; and they are all referred to in the general Index. To facilitate research, *Tables* are also prefixed, of the Statutes, Rules of Court, and Names of Cases referred to : And to the whole, there is a copious Analytical *Index*.

TEMPLE,
Dec. 12th, 1833.

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ERRATA ET CORRIGENDA.

Page 56. (a.) for § 6, read § 5.

71. (a.) for § 19, read § 18.

80. (b.) for § 2, read § 3.

88. (i.) for No. 1, read No. 3.

86. (b.) for Chap. IV, &c. § 36, read Chap. XII. § 3.

93. in marg. for Commissioners, read Commissions.

99, 100. (g.) for § 17, read § 20.

121. (i.) for § 5, read § 3.

(k.) for § 6, read § 4.

123. (i.) for reg. 2, read reg. 11.

124. (c.) The like.

202. line 22, *dele not.*

208. (f.) for § 2, read § 7.

280. line 13, for instant, or next, read or instant.

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CHAP. I.

Of ACTIONS, and the TIME limited for their COMMENCEMENT, &c.

ACTIONS are commonly divided into *criminal*, or such as concern pleas of the crown, and *civil*, or such as concern common pleas^a: And these latter are again divided into *real*, *personal*, and *mixed* actions. In a *real* action, the proceedings are *in rem*, for the recovery of *real* property only; in a *personal* action, they are *in personam*, for the recovery of specific chattels, or of some pecuniary satisfaction or recompence; and in a *mixed* action, they are *in rem et personam*, for the recovery of real property, and damages for withholding it.

Actions criminal
or civil.

Real, personal,
or mixed.

Real actions (or, as they are called in the Mirror^b, *feodal* actions,) were *droitural*, or *possessory*^c: The former, in which the demandant sued in respect of his mere right, having lost his right of possession, were commenced by writ of *right*, properly so called, or by writ in nature of a writ of *right*. A writ of *right*, properly so called, which has been said to be the highest writ in the law^d, lay for the recovery of lands and tenements, by the tenant in fee simple^e; and was *patent* or *close*.

Real actions,
droitural or
possessory.

Writ of right,
properly so
called.

When the lands were holden of a subject, the writ of *right* was *patent*, and directed to the lord of whom they were holden, or, if he were out of the realm, to his bailiffs of the manor, commanding

Right patent,
what.

^a Co. Lit. 284. b. Atcheson v. Trott, Comp. 391.

^b c. 2. § 6.

^c The following outline, or summary of real and mixed actions, was prepared by the Author upwards of thirty years ago, and is now published, with additional references, not only to shew what the law respecting these actions formerly was, and for what purposes they were intended, but also as it may tend to throw some light on the late Act for the limitation of actions

and suits relating to real property, &c., and particularly that clause of it (§ 36.) by which they are all, with a few exceptions, to be abolished after 31st December 1834. It is also observable, that by other clauses of the above act, (§§ 37, 8.) actions may be brought in certain cases, until the 1st June 1835, or even after that period.

^d F. N. B. 1. Co. Lit. 158. b. 3 Chit. Blac. Com. 193.

^e F. N. B. 1. Booth, on real actions, 87, 8.

In <i>London</i> .	the lord, without delay, to do full right to the demandant ^a . When the lands lay in <i>London</i> , the writ was directed to the Mayor and
How removed.	Sheriffs, and was called a writ of right in <i>London</i> ^b : And when the writ was brought originally in the lord's court, it was removeable into the county court, by writ of <i>tolt</i> ^c ; and from thence into the Common Pleas, by writ of <i>pone</i> , or <i>recordari facias loquelam</i> ^c .
Right close.	When the lands were holden of the King in <i>chief</i> , the writ of right was called a <i>præcipe in capite</i> , and was a writ <i>close</i> , directed to the sheriff, returnable in the Common Pleas ^d ; or, if they were
<i>Præcipe in capite.</i>	holden of a subject, the writ might nevertheless have been brought there, by consent of the lord of whom they were holden, sug-
<i>Quia dominus remisit curiam.</i>	gesting that he had <i>remitted</i> his court; and then it was called a writ of right <i>quia dominus remisit curiam</i> ^e . There was likewise a
For lands in ancient demesne.	writ, called a little writ of right close, <i>parvum breve, secundum consuetudinem manerii</i> , which lay for the king's tenants in <i>ancient demesne</i> , and others of a similar nature ^f , to try the right to their
<i>De rationabili parte.</i>	lands and tenements, in the court of the lord exclusively ^g . When the writ of right was brought by one parcener, &c., in fee against another, who entered into the whole, it was called a writ of right <i>de rationabili parte</i> ^h ; or, if brought for an <i>advowson</i> , by him who had the fee, it was called a writ of right of <i>advowson</i> ⁱ .
Right of advowson.	The writ of <i>right</i> , properly so called, only lay for tenant in fee simple, of lands or tenements ^k ; and therefore, where the tenant's estate or interest was not of so high a nature, other writs were provided by the common law, in nature of a writ of right ^l ; as the writ of
Writs in nature of writ of right.	<i>formedon</i> , which lay for tenant in tail, remainder-man, or reversioner,
Formedon.	

^a F. N. B. 1. Booth, 87. Com. Dig. tit. *Droit*, B. 1. 3 Chit. Blac. Com. 194, 5. and see 2 Wms. Saund. 5 Ed. 45. n. 3 Chit. Pl. 1355, &c. Roscoe on real actions, 20. Lee Pr. Dict. 1051. Tyssen v. Clarke, 3 Wils. 419. 541.

^b F. N. B. 6. Booth, 117. Com. Dig. tit. *Droit*, D. 1 Rosc. 21.

^c F. N. B. 3. Booth, 89. Com. Dig. tit. *Droit*, B. 5, 6. 3 Blac. Com. 196. 1 Rosc. 20.

^d F. N. B. 5. Booth, 116. Com. Dig. tit. *Droit*, C. 1. 1 Rosc. 20.

^e Booth, 91. Com. Dig. tit. *Droit*, C. 2. 2 Wms. Saund. 45. n. 3 Chit.

Blac. Com. 194. 1 Rosc. 20.

^f Kitchen, tit. *Copyhold*.

^g F. N. B. 11. Booth, 116. 3 Chit. Blac. Com. 194, 5. 3 Chit. Pl. 1388. 1 Rosc. 23.

^h F. N. B. 9. Booth, 119. Finch L. 312. 3 Chit. Blac. Com. 194. 1 Rosc. 25.

ⁱ F. N. B. 30. Booth, 121. 3 Chit. Blac. Com. 250. 1 Rosc. 26.

^k F. N. B. 1. Co. Lit. 158. b. Booth, 87, 8.

^l For the difference between writs of right, properly so called, and writs in nature of writs of right, see Booth, 88.

in the *descender*^a, *remainder*^b, or *reverter*^c; the writ of right of *dower*, which was sometimes, though improperly, called a writ of right^d, and lay to the heir or feoffee, to do right to the widow, when she had had only part of her dower^e; or, if no part of the dower had been assigned, the widow might have had a writ of dower *unde nihil habet*^f; and if the heir, being within age, or his guardian, assigned her more than she ought to have had, they might have been remedied by a writ of *admeasurement* of dower^g; the writ of *quod ei deforceat*, which was given by the statute Westm. II. (13 Edw. 1.) c. 4. where the owners of a particular estate, as for life, in dower, by the curtesy, or in fee tail, were barred of the right of possession, by a recovery had against them, on their default or non-appearance, in a possessory action^h; and the writ of *deceit*, which lay for a tenant in a real action, who had lost lands by default, in consequence of his not having been summoned by the sheriff, against the recoveror, and against the sheriff for his false returnⁱ. This writ also lay, where a fine was levied in the court of Common Pleas, of lands holden in *ancient demesne*, in which case the lord might have reversed it by writ of *deceit*; and such writ might have been brought by the lord against the parties to the fine, and the *cestui que use*; and thereby he obtained judgment, not only for damages, (which were usually remitted,) but also to recover his court, and jurisdiction over the lands,

Right of dower.

Dower *unde nihil habet*.

Admeasurement of dower.

Quod ei deforceat.

Writ of deceit.

For reversing fine or recovery, of lands in ancient demesne.

^a F. N. B. 211. Booth, 140. Com. Dig. tit. *Pleader*, 3 E. 1, &c. 3 Chit. Blac. Com. 191. 1 Rosc. 54.

^b F. N. B. 217. Booth, 151. Com. Dig. tit. *Pleader*, 3 E. 1, &c. 3 Chit. Blac. Com. 191. 1 Rosc. 57.

^c F. N. B. 219. Booth, 154. Com. Dig. tit. *Pleader*, 3 E. 1, &c. 3 Chit. Blac. Com. 191. 1 Rosc. 59.

^d The writ of *right*; properly so called, lay for the recovery of lands and tenements in fee simple only; (*ante*, l.) but the writ of right of *dower* was brought for the recovery of an estate for life.

^e F. N. B. 7. Booth, 118. Com. Dig. tit. *Dower*, G. 1. 3 Chit. Blac. Com. 183. 1 Rosc. 29.

^f F. N. B. 147. Booth, 166. Com. Dig. tit. *Dower*, G. 2. 3 Chit. Blac.

Com. 183. This writ was formerly considered as a writ of right in its nature; Booth, 166. but damages having been given therein, by the statute of *Merton*, (20 Hen. III.) c. 1. it is now properly considered as a *mixed* action.

^g F. N. B. 148. Finch, L. 314. Com. Dig. tit. *Dower*, G. 3 Chit. Blac. Com. 183.

^h F. N. B. 155. Booth, 253. Finch L. 267. Com. Dig. tit. *Quod ei deforceat*, A. 3 Chit. Blac. Com. 193. 1 Rosc. 132.

ⁱ F. N. B. 99. G. Booth, 251. 1 Rosc. 136. This writ was sometimes issued out of the Common Pleas; or it might have been sued out of the court of Chancery. F. N. B. 99, G. Booth, 252.

CHAP. I. and to annul the former proceedings^a. This writ, it will be seen^b, is one of those intended to be abolished by the statute 3 & 4 W. IV. c. 27. § 36. But, by a subsequent statute^c, "fines and recoveries of lands in ancient demesne, when levied or suffered in a superior court, may be reversed, as to the lord, by writ of *deceit*, the proceedings in which were then pending, or by writ of *deceit*, thereafter to be brought; but shall be as valid against the parties thereto, and persons claiming under them, as if not reversed as to the lord." It may admit of doubt, whether, under this latter statute, a writ of *deceit* can be brought, for reversing a fine or recovery of lands in ancient demesne, after the periods mentioned in the former statute.

Writs founded on relation of lord and tenant.
Right *sur disclaimer*.
Right of ward.

De nativo habendo.

Customs and services.

Cessavit per biennium.

Escheat.

Other writs, in nature of writs of right, chiefly founded on the relation of lord and tenant, were, on behalf of the former, the writ of right *sur disclaimer*, which lay for land which the tenant disclaimed to hold of him^d; the writ of right of *ward*, which lay where the tenant died in his homage, and a stranger seized the body or land of the heir^e; the writ *de nativo habendo*, where the lord claimed an inheritance in his villein, who fled out of his manor^f; the writ of *customs and services*, which lay for the lord, when his tenant deforced him of his rent, or other services^g; the writ of *cessavit per biennium*^h, which was given by the statute of *Gloucester*, (6 Edw. I.) c. 4. and *Westm.* II. (13 Edw. 1.) c. 21. & 41., where the tenant ceased to do his services for two years, and there was no distress for themⁱ; the writ of *escheat*, which lay when a tenant in fee died without

^a F. N. B. 98. 2 Inst. 513. Rast. Ent. 100. b. Zouch v. Thompson, 3 Lev. 415. 419. 1 Ld. Raym. 177. 1 Salk. 210. 3 Salk. 35. S. C. Earl of Plymouth v. James, 1 Lutw. 711. Rex v. Firebrace, Barnes, 258. Rex v. Mead, 2 Wils. 17. Rex v. Hadlow, 2 Blac. Rep. 1170. 3 Chit. Blac. Com. 166. 5 Cruise Dig. 102. 250. 484. 1 Rosc. 139.

^b Post, 13.

^c 3 & 4 W. IV. c. 74. § 4.

^d Booth, 133. Com. Dig. tit. *Droit*, F. 3 Chit. Blac. Com. 233. 1 Rosc. 31.

^e F. N. B. 139. Booth, 132. 1 Rosc. 31.

^f F. N. B. 77. Booth, 127. Lil. Ass.

in Pref. 6, 7. Com. Dig. tit. *Villinage*, C. 1. 1 Rosc. 35. Upon a *nativo habendo* delivered to the sheriff, before removal by *pone*, the defendant might have sued out a writ *de libertate probandâ*, whereupon the whole was removed before the justices in Eyre. Com. Dig. tit. *Villinage*, C. 3. 1 Rosc. 36.

^g F. N. B. 151. Com. Dig. tit. *Droit*, G. 3 Chit. Blac. Com. 231. 1 Rosc. 32.

^h In Co. Lit. 239, this is called a writ of *entry*.

ⁱ F. N. B. 208. Booth, 133. Com. Dig. tit. *Cessavit*, A. 3 Chit. Blac. Com. 231, 2. 1 Rosc. 32.

heir^a; the writs of *quid juris clamat, quem redditum reddit*, and *per quæ servitia*, the first of which lay for the grantee by fine of a reversion or remainder, to enforce the attornment of the tenant for life^b; the second, for the grantee by fine of a rent, to compel the tenant of the land out of which it issued to attorn^c; and the third, for the conusee in a fine, to whom the lord had granted his seignory^d; also, the writ of *secta ad molendinum*, which lay for the tenant's refusing to grind at the lord's mill, as he ought, by service or prescription^e. On behalf of the tenant, writs, in nature of writs of right, were the writ of *ne injuste vezes*, which lay for the tenant, when the lord, without coercion, had seisin of greater services than he ought^f; the writ of *mesne*, which lay for the tenant paravail to be acquitted, when he was distrained by the lord paramount^g; and the writ of *warrantia chartæ*, which lay where a man enfeoffed another by deed, and bound himself and his heir to warranty, &c., and the feoffee was afterwards impleaded in an assise, or writ of entry in nature of an assise, in which he could not vouch^h. There were also some writs, in nature of writs of right, peculiarly applicable to tolls, commons, ways, boundaries, and inclosures: as the writ of *de essendo quietum de theolonio*, to be quit of tollsⁱ; the writ of *quo jure*, which lay by him who had the fee in the land, against him who claimed common there^k; the writ of *quod permittat*, for the tenant to have common of pasture^l, or estovers¹; the writ of ad-

CHAP. I.

Secta ad molendinum.

On behalf of tenant.

Mesne.

Warrantia chartæ.

Writs applicable to tolls, &c.

*De essendo quietum, &c. Quo jure.**Quod permittat.*

Admeasurement of pasture.

^a F. N. B. 143. Booth, 135. Com. Dig. tit. *Escheat*, B. 1. 3 Chit. Blac. Com. 194. 1 Rosc. 34.

^b F. N. B. 147. A. Co. Lit. 316. b. 320. a. b. Booth, 249, 50. Vin. Abr. tit. *Quid juris clamat*. Com. Dig. tit. *Fine*, F. Prest. Shep. Touch. 255.

^c Co. Lit. 316. b. Booth, 250. Com. Dig. tit. *Fine*, F. Prest. Shep. Touch. 255.

^d Co. Lit. 252. a. 316. b. 320. b. Booth, 249. Com. Dig. tit. *Fine*, F. Prest. Shep. Touch. 255. and see stat. 23 Eliz. c. 3. § 5. 1 Rosc. 145.

^e F. N. B. 122. Booth, 137. Com. Dig. tit. *Droit*, H. 3 Chit. Blac. Com. 235. 1 Rosc. 36.

^f F. N. B. 10. Booth, 126. Com. Dig. tit. *Droit*, I. 3 Chit. Blac. Com. 234. 1 Rosc. 37.

^g F. N. B. 135. Booth, 136, 7. Com. Dig. tit. *Droit*, K. 3 Chit. Blac. Com. 234. 1 Rosc. 38.

^h F. N. B. 134, 5. Booth, 240. 3 Chit. Blac. Com. 300. 1 Rosc. 142.

ⁱ F. N. B. 226. and see Mayor, &c. of London v. Mayor, &c. of Lynn, 1 H. Blac. 206. The judgment of the Common Pleas, in this case, was reversed in the King's Bench; 4 Durnf. and E. 130. but the latter judgment was reversed in the House of Lords. 1 Bos. & P. 487. 6 Durnf. & E. 778.

^k F. N. B. 128. Booth, 129. Com. Dig. tit. *Quo jure*, A. 1 Rosc. 36.

^l F. N. B. 123. Booth, 237. Com. Dig. tit. *Quod permittat*, A. 3 Chit. Blac. Com. 240. 1 Rosc. 40.

*De secundâ
superoneratione.
Quare obstruxit.*

*De rationa-
bilibus divisis.*

*De perambula-
tione faciendâ.*

*De curiâ clau-
dendâ.*

Real actions
possessory.

Assise.

Different kinds
of.

Novel disseisin.

measurement of pasture^a; and the writ *de secundâ superoneratione*^b, or second surcharge; the writ of *quare obstruxit*, which lay against him who obstructed the plaintiff's way, to which he had a right, in the land of another^c; the writ *de rationabilibus divisis*, which lay for him who had land in a vill or hamlet, against him who had land near him in another, to ascertain the limits of the vill, and by consequence of the lands, which were not before known^d; the writ *de perambulatione faciendâ*, which lay when two lords were in doubt as to the limits of their lordships, vill, &c., and by consent appeared in Chancery, and agreed that a perambulation should be made between them^e; and the writ *de curiâ claudendâ*, for compelling the tenant of adjoining land to make an inclosure^f.

Real actions *possessory*, in which the demandant, not being put to his mere right, sued in respect of his right of possession, were in general commenced by *assise*, or writ of entry. The *assise*, which is said to have been invented by *Glanville*, chief justice to *Henry II.*^g, lay for the recovery of lands, tenements, rents, commons^h, officesⁱ, tithes^k, &c., of which a man, or his ancestor, had been disseised, and was of four kinds: 1st, an assise of *novel disseisin*; 2dly, an assise of *mort d'ancestor*; 3dly, an assise of *darrein presentment*; 4thly, an assise of *juris utrum*^l; and 5thly, an assise of *nuisance*. The assise of *novel disseisin* lay for the recovery of lands, &c., of which the freeholder was disseised^m. The assise of

^a F. N. B. 125. Finch L. 314. 3 Chit. Blac. Com. 238.

^b 3 Chit. Blac. Com. 239.

^c Com. Dig. tit. *Quare obstruxit*, A.

^d F. N. B. 128. Booth, 130. Finch L. 316. Com. Dig. tit. *Droit*, L. 1 Rosc. 31.

^e F. N. B. 133, 4. Finch L. 319. Com. Dig. tit. *Pleader*, 3 G.

^f F. N. B. 127. Booth, 242. Com. Dig. tit. *Droit*, M. 1 Rosc. 144.

^g Mirror, c. 2. § 25. 3 Chit. Blac. Com. 184.

^h F. N. B. 179. 1 Rosc. 65. 67.

ⁱ Lil. Ass. 137. 1 Rosc. 66.

^k 1 Rosc. 68.

^l Co. Lit. 155. a. Com. Dig. tit. *Assise*, A.

^m F. N. B. 177. Booth, 210. 262.

Lil. Ass. 1, &c. Com. Dig. tit. *Assise*, B. 1, &c. 3 Chit. Blac. Com. 186. 1 Rosc. 63. In this assise, the plaintiff was entitled to recover his land, with damages and costs; Com. Dig. tit. *Assise*, B. 1. and see 2 Inst. 296. Pilfold's case, 10 Co. 115. 3 Chit. Blac. Com. 187, 6. And it is said, that by the common law, damages, as well as land, were not recovered in any other action. Com. Dig. tit. *Assise*, B. 1. By the statute of *Gloucester*, (6 Edw. 1.) c. 1. § 1, damages were given in an assise of, or writ of entry upon a *novel disseisin*, against the alienor, or him that was found tenant after the disseisor; and, by the 3 & 4 Edw. VI. c. 3. § 4, treble damages might have been recovered, in an assise of *novel disseisin*, upon the statutes respecting the improve-

mort d'ancestor lay by an heir, after an abatement by a stranger on the lands, &c., of which his father or mother, brother or sister, uncle or aunt, nephew or niece, was seised at the day of his or her death^a: But this writ did not lie upon an abatement, after the death of the grandfather or grandmother, or great grandfather or great grandmother, or of the *tresaiel*, or other collateral cousin more remote^b.

Mort d'ancestor.

An assise of *darrein presentment* lay, where a man, or his ancestor, had presented to a church, and, upon a subsequent avoidance, another usurped upon him^c. The assise of *juris utrum*, being the highest writ which a parson could have^d, lay where the lands and tenements of a

Darrein presentment.

Juris utrum.

rectory were aliened by the predecessor of the parson, or were recovered against the predecessor by verdict, or by confession or default, without praying in aid of the patron and ordinary^e, &c. The writ of assise of *nuisance* lay for abating a nuisance, to the plaintiff's house or land, &c.^f; on which, if he succeeded, he was entitled to judgment of two things; 1. to have the nuisance abated; and 2. to recover damages^g.

Nuisance.

Writs of entry into lands or tenements shewed by what means the tenant entered, and what cause the demandant had to demand the possession^h; and were founded upon the entry of the tenant after a *disseisin*, *intrusion*, *alienation*, or *abatement*. Upon a *disseisin*, they were in the *quibus*, or in nature of an assiseⁱ, for a disseisin done to the demandant, or his ancestors. In this writ,

Writs of entry.

Upon a disseisin.

ment of wastes, &c. See also the statutes of Westm. I. (3 Edw. I.) c. 24. Westm. II. (13 Edw. I.) c. 25. 1 Rich. II. c. 9. 1 Hen. IV. c. 8. and 4 Hen. IV. c. 8, by which *double* or *treble* damages were given, upon disseisins in particular cases. Tidd Prac. 9 Ed. 870.

^a F. N. B. 195. Co. Lit. 159. a. Booth, 206. Finch L. 290. Com. Dig. tit. *Assise*, C. 3 Chit. Blac. Com. 185. 231. 1 Rosc. 127. By the statute of *Marlbridge*, (52 Hen. III.) c. 16, damages were given in an assise of *mort d'ancestor*, in cases where the land was recovered against the chief lord; and, by the statute of *Gloucester*, (6 Edw. I.) c. 1. §1. damages were given in all cases where a man recovered by assise of *mort d'ancestor*, &c.

^b F. N. B. 221. Com. Dig. tit. *Assise*, D. 3 Chit. Blac. Com. 185.

^c F. N. B. 31. Com. Dig. tit. *Quare Impedit*, C. 3 Chit. Blac. Com. 245. 1 Rosc. 74. On this writ, damages were recoverable, by the statute Westm. II. (13 Edw. I.) c. 5. § 3.

^d F. N. B. 48. Co. Lit. 169. a.

^e F. N. B. 48. Booth, 221. Com. Dig. tit. *Quare Impedit*, E. 3 Chit. Blac. Com. 252, 3. 1 Rosc. 74.

^f F. N. B. 183. 3 Chit. Blac. Com. 221.

^g 9 Co. 55. 3 Chit. Blac. Com. 221.

^h Booth, 172. Com. Dig. tit. *Dum fuit infra etatem*, A.

ⁱ F. N. B. 191. Booth, 174. Com. Dig. tit. *Dum fuit infra etatem*, H. 1 Rosc. 91.

- Degrees in. there were *three* degrees; 1. in the *per*, when the tenant claimed by him who made the disseisin; 2. in the *per* and *cui*, when he claimed in the second degree; and 3. in the *post*, when he claimed after the two former degrees were past ^a: And on this latter writ common recoveries were usually suffered. The writ of entry upon an *intrusion* lay, where any one intruded after the death of a particular tenant ^b; or intruded upon or detained lands, after a term had expired, which was called a writ of entry *ad terminum qui præterit* ^c; or where a woman gave land to a man, in fee or for life, to marry her in convenient time, and he did not, in which case she might have recovered the land by writ of entry *causâ matrimonii prælocuti* ^d. The writs of entry upon an *alienation* were first, where the alienation was made by a person incapable, as by an infant, idiot, or person in prison, &c.; secondly, where it was made by a particular tenant; thirdly, where it was made by a husband, of his wife's estate; and fourthly, by ecclesiastical persons.
- Upon an intrusion. Of the first kind were the writs of *dum fuit infra ætatem* ^e, *dum fuit non compos mentis* ^f, and *dum fuit in prisona* ^g; which lay for a person of full age, or one who had recovered his understanding, or liberty, after having, when under age, insane, or in prison, aliened his lands; or for the heir of such alienor. Of the second kind were the writ of entry *ad communem legem*, which lay for the reversioner, after the alienation and death of the particular tenant for life ^h; and the writs *in casu proviso* ⁱ, and *in consimili casu* ^k, which lay not at common law, but were given by the statutes of *Gloucester*, (6 Edw. 1.) c. 7, & *Westm. II.*, (13 Ed. 1.) c. 24, for the reversioner, after the alienation, but during the life of the tenant
- Upon an alienation. By a person incapable. By a particular tenant.

^a F. N. B. 191. Booth, 172. 175. Rosc. 93.
Com. Dig. tit. *Dum fuit infra ætatem*, A.
3 Chit. Blac. Com. 180, 81. 3 Chit. Pl. 1339, &c. 1 Rosc. 88.

^b F. N. B. 203. Booth, 181. Com.
Dig. tit. *Dum fuit infra ætatem*, A.
3 Chit. Pl. 1330, &c. 1 Rosc. 92.

^c F. N. B. 201. Booth, 195. Com.
Dig. tit. *Dum fuit infra ætatem*, A. 1
Rosc. 97.

^d F. N. B. 205. Co. Lit. 204. 226.
Booth, 197. Com. Dig. tit. *Dum fuit
infra ætatem*, A. 1 Rosc. 98.

^e F. N. B. 192. Booth, 193. Com.
Dig. tit. *Dum fuit infra ætatem*. 1

^f F. N. B. 202. Booth, 189. Com.
Dig. tit. *Dum fuit infra ætatem*, B. 1
Rosc. 92, 3.

^g 2 Inst. 482. 1 Rosc. 93.
^h F. N. B. 207. Booth, 190. Com.
Dig. tit. *Dum fuit infra ætatem*, C. 1
Rosc. 93.

ⁱ F. N. B. 205. Booth, 197. Com.
Dig. tit. *Dum fuit infra ætatem*, D.
1 Rosc. 94.

^k F. N. B. 206. Booth, 199. Com.
Dig. tit. *Dum fuit infra ætatem*, E. 1
Rosc. 95.

in dower, or other tenant for life. Writs of the third kind were the *cui in vitâ*^a, and *cui ante divortium*^b, which formerly lay for a woman, when a widow, or divorced, whose husband during the coverture, (*cui in vitâ sua, vel cui ante divortium, ipsa contradicere non potuit*), aliened her estate; *sur cui in vitâ*, and *sur cui ante divortium*, which lay, in such case, for the heir of the wife; and, of the fourth kind, by ecclesiastical persons, was the writ of entry *sine assensu capituli*, which lay for the successor, upon an alienation by the dean, &c. without the consent of the chapter^c. The writ of entry, upon an *abatement*, lay where a person died seised of an inheritance, and, before the heir or devisee entered, a stranger, who had no right, made entry, and got possession of the freehold^d: The proper remedy however, for the recovery of land, after an *abatement*, seems to have been by assize of *mort d'ancestor*, or writ of *aiel*, *besaiel*, or *cosinage*.

By husband, of his wife's estate.

By dean, &c. without consent of chapter.

Upon an abatement.

The assize of *mort d'ancestor*, we have seen^e, did not lie upon the death of any ancestor, except a father or mother, brother or sister, uncle or aunt, nephew or niece: Therefore, upon the death of any other ancestor, the writ of *aiel*, *besaiel*, or *cosinage*, was the proper remedy. And where lands were devisable in a man's last will, by the custom of the place, there an assize of *mort d'ancestor* did not lie, but the writ *ex gravi querelâ*^f; and therefore, when all lands were devisable by the statute of wills, &c. the assize of *mort d'ancestor* seems to have become obsolete^g. An *aiel*, or *besaiel*, lay for the heir, upon an abatement after the death of the grandfather or grandmother, or great grandfather or great grandmother^h; and a writ of *cosinage*, upon the death of the grandfather's grandfather or grandmother, or any collateral relation, other than those for whom a *mort d'ancestor* layⁱ. A *nuper obiit* lay when one parcener,

Writs ancestral possessory.

Aiel, or *besaiel*.

Cosinage.

Nuper obiit.

^a F. N. B. 183. Booth, 185. Com. Dig. tit. *Baron & Feme*, I. 3. 1 Rosc. 96.

^b F. N. B. 204. Booth, 188. Com. Dig. tit. *Dum fuit infra ætatem*, G. 1 Rosc. 97.

^c F. N. B. 194. Booth, 199. 1 Rosc. 97: And for a general summary of writs of entry, see 3 Chit. Blac. Com. 183. z.

^d Smith v. Coffin, 2 H. Blac. 444. Rowles v. Lusty, 1 Moore & P. 102. 4 Bing. 428. S. C.

^e *Anle*, 6, 7.

^f F. N. B. 198.

^g 3 Chit. Blac. Com. 186, 7.

^h F. N. B. 221. Booth, 200. Com. Dig. tit. *Assise*, D. 3 Chit. Blac. Com. 185. 1 Rosc. 75. 127.

ⁱ F. N. B. 221. Booth, 200. Com. Dig. tit. *Assise*, D. 3 Chit. Blac. Com. 185. 1 Rosc. 127. By the statute of Gloucester, (6 Edw. 1.) c. 1. § 1, damages were given in all cases where a man recovered upon writs of *cosinage*, *aiel*, and *besaiel*, or against a tenant, upon his own intrusion or act.

Difference between *rationabili parte*, and *nuper obiit*.

Re-disseisin.

Post disseisin.

Other possessory writs.

De partitione faciendâ.
De reparatione faciendâ.

Quod permittat prosternere.
Estreperment of waste.

Mixed actions, what.
Dower unde nihil habet.

after the death of the ancestor, ousted the other^a. The difference between a writ of right *de rationabili parte*, of which we have before spoken^b, and a *nuper obiit*, consisted in this, that the former might have been grounded upon the seisin of the ancestor, at any time during his life; but in the latter, he must have been seised at the time of his death^c. In order to prevent frequent and vexatious disseisins, the writ of *re-disseisin* was given by the statute of *Merton*, (20 Hen. III.) c. 3., after a recovery in *assise*, of land, rent, or common^d, &c.; and the writ of *post disseisin*, which was given by the same statute, after a recovery by verdict, in any real action^e. And, besides the writs which have been mentioned, there were others of a *possessory* nature, for the benefit of joint tenants, or tenants in common, and respecting nuisances, or waste: as the writ *de partitione faciendâ*^f, for making partition between joint tenants, and tenants in common; the writ *de reparatione faciendâ*, which lay where there were two joint tenants, or tenants in common of a mill or house, &c., which fell to decay, and one would repair, but the other would not repair the same^g; the writ of *quod permittat prosternere*, to abate a nuisance^h; and the writ of *estrepement*, for the prevention of wasteⁱ.

Mixed actions were *Dower unde nihil habet*, *Quare impedit*, *Ejectment*, *Quare ejecit infra terminum*, *Waste*, and *Covenant real*. The writ of *dower*, *unde nihil habet*, was formerly considered as a writ of right in its nature^k; and lay in all cases where a woman had a right to dower^l, except where she had received part from

^a F. N. B. 197. Booth, 204. Com. Dig. tit. *Assise*, E. 3 Chit. Blac. Com. 185, 6. 1 Rosc. 127.

^b *Ante*, 2.

^c Booth, 205. 3 Chit. Blac. Com. 194.

^d F. N. B. 188. Booth, 260. Com. Dig. tit. *Assise*, F. 1. 3 Chit. Blac. Com. 188. 1 Rosc. 70.

^e F. N. B. 190. Booth, 260. Com. Dig. tit. *Assise*, F. 1. 3 Chit. Blac. Com. 188. 1 Rosc. 72. Double damages were recoverable upon the writ of *re-disseisin*, or *post disseisin*, by the statute *Westm. II.* (13 Edw. 1.) c. 26. Booth, 260. 1 Rosc. 73.

^f F. N. B. 61. Booth, 244. Com.

Dig. tit. *Pleader*, 3 F. 1, &c. 2 Chit. Blac. Com. 189. 3 Chit. Pl. 5 Ed. 1390, &c. 1 Rosc. 130. 2 Crompt. Pr. 308, &c. 2 Sel. Pr. 307, &c. and see stat. 8 & 9 W. III. c. 31.

^g F. N. B. 127, but see *Tenant v. Goldwin*, 2 Ld. Raym. 1093. where it was said by *Holt*, Ch. J. that this writ was grounded on the custom of a place, and not upon the common law.

^h F. N. B. 124. 3 Chit. Blac. Com. 221, 2.

ⁱ F. N. B. 60, 61. 3 Chit. Blac. Com. 225, 6. 1 Rosc. 124.

^k *Ante*, 3.

^l As to the widow's right to dower, see stat. 3 & 4 W. IV. c. 105.

the tenant, in the same town wherein she demanded it ^a. In this action, the widow is entitled, by the statute of *Merton*, (20 Hen. III.) c. 1. to recover in damages the value of her dower, from the time of the death of her husband ^b: But, by the statute 3 & 4 W. IV. c. 27. § 41. "no arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained, by any action or suit, for a longer period than *six* years next before the commencement of such action or suit." The writ of *quare impedit* is an ancient writ, which lies by him who, being in possession of an advowson of a church, is disturbed in his presentation ^c: And, by the statute of Westm. II. (13 Edw. I.) c. 5. § 3. damages are given in writs of *quare impedit*, and *darrein presentment*.

CHAP. I.

No arrears of dower to be recovered for more than six years.

Quare impedit.

The action of *ejectment* is, in point of form, a *personal* action of *trespass* ^d; but, in effect, it is a *mixed* action, by which a lessee for years, when ousted of his possession, may recover his term, and damages ^e: It is *real* in respect of the *lands*, but *personal* in respect of the *damages* ^f. The writ of *quare ejecit infra terminum* lay, where a man leased lands to another for years, and afterwards he entered and made a feoffment in fee, or for life, of the same lands, to a stranger; in which case the lessee might have had this writ against the feoffee, or lessee for life, and recovered his term again, and damages also, if it were not ended; if it were, then all his damages ^g.

Ejectment.

Quare ejecit infra terminum.

^a F. N. B. 147, 8. Booth, 166. Com. Dig. tit. *Dower*, G. 2. tit. *Pleader*, 2 Y. 1, &c. Bac. Abr. tit. *Dower*, 1. 2 Wms. Saund. 5 Ed. 43, 4. (1, 2, 3, 4.) 3 Chit. Blac. Com. 183. 3 Chit. Pl. 1311, &c. 1 Rosc. 39. 2 Crompt. Pr. 328, &c. 2 Sel. Pr. 291, &c.

^b For the construction of this statute, and in what cases the widow was entitled to damages thereon, see Co. Lit. 32, 3.

^c 2 Inst. 356. and see F. N. B. 32. Booth, 223. Mallory's *Quare Impedit*. Com. Dig. tit. *Quare Impedit*, D. tit. *Pleader*, 3 I. 1, &c. 3 Blac. Com. 246, &c. 3 Chit. Pl. 1301, &c. 1 Rosc. 100, &c. 2 Lee Pr. Dict. 975. 2 Crompt. Pr. 296, &c. 2 Sel. Pr. 320, &c.

^d Steph. Pl. 22. *Id.* Append. vii, viii.

^e F. N. B. 220. H. and see Com. Dig. tit. *Pleader*, 2 Z. 1, &c. Bac. Abr. tit. *Ejectment*; the Treatises of Ld. Ch. Baron Gilbert, Serjeants *Runnington*, and *Adams*; 3 Chit. Blac. Com. 199, &c. 2 Chit. Pl. 877, &c. Chit. Pr. 218, &c. 2 Rosc. 481, &c. 2 Crompt. Pr. 158, &c. 2 Sel. Pr. 159, &c. Imp. K. B. 556, &c. Imp. C. P. 561, &c. 1 Lee Pr. Dict. 440, &c. 2 Archb. Pr. 42, &c. and Tidd Pr. 9 Ed. 1189, &c.

^f Run. Eject. 2 Ed. I.

^g Run. Eject. 2 Ed. 501, 2. and see F. N. B. 197, 8. Com. Dig. tit. *Quare ejecit infra terminum*. 3 Chit. Blac. Com. 207. Ad Eject. 3 Ed. 3, &c. 1 Rosc. 98.

Writ of waste.

The writ of *waste* was partly founded upon the common law, and partly upon the statute of *Gloucester*, (6 Edw. I.) c. 5.; and might have been brought by him who had the immediate estate of inheritance, in reversion or remainder, against the tenant for life, tenant in dower, tenant by the curtesy, or tenant for years. This action was also maintainable, in pursuance of the statute Westm. II. (13 Edw. I.) c. 22, by one tenant in common of the inheritance against another, who made waste in the estate holden in common: the equity of which statute extended to joint tenants, but not to coparceners^a. In this action *treble* damages were recoverable, by the statute of *Gloucester*, (6 Edw. I.) c. 5^b; to which costs were superadded, by the statute 8 & 9 W. III. c. 11. § 3. The writ of covenant *real*, upon which fines were formerly levied, was also considered as a *mixed* action; being partly of a *personal*, and partly of a *real* nature^c.

Real and mixed actions to be abolished, after 31st December 1834.

Real and *mixed* actions, however, having, with a few exceptions, fallen into disuse, (being superseded by the action of *ejectment*, and other more convenient remedies,) and the prosecution of them being attended with great difficulty, delay, and expense, it was enacted by the late statute, for the limitation of actions and suits relating to real property, and for simplifying the remedies for trying the rights thereto^d, that "no writ of right patent, writ of right *quia dominus remisit curiam*, writ of right *in capite*, writ of right in "London, writ of right close, writ of right *de rationabili parte*, "writ of right of advowson; writ of right upon disclaimer, writ *de rationabilibus divisis*, writ of right of ward, writ *de consuetudinibus et servitiis*, writ of *cessavit*, writ of escheat, writ of *quo jure*, writ "of *secta ad molendinum*, writ *de essendo quietum de theolonio*, writ "of *ne injuste vexes*, writ of *mesne*, writ of *quod permittat*, writ "of *formedon in descender*, in *remainder*, or in *reverter*; writ of assise "of *novel disseisin*, nuisance, *darrein presentment*, *juris utrum*, or "mort d'ancestor; writ of entry *sur disseisin* in the *quibus*, in the "per, in the *per* and *cui*, or in the *post*, writ of entry *sur* intrusion,

^a 3 Chit. Blac. Com. 227. and see F.N.B. 55. Com. Dig. tit. *Pleader*, 3 O.1, &c. Bac. Abr. tit. *Waste*, G. &c. 3 Blac. Com. 118. 1 Rosc. 107, &c. 2 Crompt. Pr. 320, &c. 2 Sel. Pr. 335, &c.

^b Redfern v. Smith, 9 Moore, 497. 2 Bing. 262. S. C.

^c F. N. B. 146. Booth, 247. and see 3 Chit. Blac. Com. 157.; but see 10 Hen. VI. 12, 13. where it was said by *Paston*, that this was only a *personal* action, and a release of all actions *personal* was a good plea therein.

^d 3 & 4 W. IV. c. 27. § 36.

" writ of entry *sur* alienation, *dum fuit non compos mentis, dum fuit*
" infra ætatem, dum fuit in prisonâ, ad communem legem, in casu
" proviso, in consimili casu, cui in vitâ, sur cui in vitâ, cui ante
" divorcium, or sur cui ante divorcium, writ of entry sur abatement,
" writ of entry quare ejecit infra terminum^a, or ad terminum qui
" præteriit, or causâ matrimonii prælocuti, writ of aiel, besaiel,
" tresaiel, cosinage, or nuper obiit ; writ of waste, writ of partition,
" writ of disceit^b, writ of quod ei deforceat, writ of covenant real,
" writ of warrantia chartæ, writ of curia claudenda, or writ per
" quæ servitia^c, and no other action, real or mixed, (except a writ
" of right of dower, or writ of dower unde nihil habet, or a quare
" impedit, or an ejectment,) and no plaint in the nature of any such
" writ or action, except a plaint for free bench, or dower, shall be
" brought after the 31st day of December 1834."

Except dower,
quare impedit,
 and ejectment.

" Provided always, that when, on the said 31st day of *December*
" 1834, any person, who shall not have a right of entry to any land,
" shall be entitled to maintain any such writ or action as aforesaid,
" in respect of such land, such writ or action may be brought at
" any time before the 1st day of June 1835, in case the same might
" have been brought if that act had not been made, notwithstanding
" the period of twenty years thereinbefore limited shall have expired."^d

Real and mixed
 actions may,
 in certain cases,
 be brought until
 1st June 1835.

" Provided also, that when, on the said 1st day of *June 1835, any*
" person, whose right of entry to any land shall have been taken
" away by any descent cast, discontinuance, or warranty, might
" maintain any such writ or action as aforesaid, in respect of such
" land, such writ or action may be brought after the said 1st day of
" June 1835, but only within the period during which, by virtue of
" the provisions of this act, an entry might have been made upon
" the same land, by the person bringing such writ or action, if his
" right of entry had not been so taken away."^e

Or even after
 that period.

The right of entry, which is necessary to maintain an *ejectment*,
 being tolled or taken away, at common law, by a *descent cast^f*, or

Descent cast,
 &c. not to toll
 right of entry,
 &c.

^a The writ of *quare ejecit infra terminum* does not seem to have been a writ of entry, as here supposed ; but was a mixed action, for the recovery of the term, if not expired, and damages. *Ante*, 11.

^b As to this writ, *vide ante*, 3, 4.

^c This classification of real and mixed actions seems to have been taken from

Mr. Roscoe's Table of such Actions, 1 V. 3, 4 ; and see the Table of civil Actions, in Com. Dig. tit. *Action*, (D. 2.)

^d § 37.

^e § 38.

^f 3 Chit. Blac. Com. 176. and see Run. Eject. 2 Ed. 49. Ad. Eject. 3 Ed. 41. 1 Rosc. 81.

- CHAP. I.** *discontinuance*^a, and the right of the heir barred by a *warranty*^b; it was enacted, by the statute 3 & 4 W. IV. c. 27. § 39, that "no descent cast, discontinuance, or warranty, which may happen or be made after the said 31st day of *December* 1833, shall toll or defeat any right of entry, or action for the recovery of land:" And, by the statute 3 & 4 W. IV. c. 74. § 14, "all warranties of lands, which, after the 31st day of *December* 1833, shall be made or entered into by any tenant in tail thereof, shall be absolutely void against the issue in tail, and all persons whose estates are to take effect after the determination, or in defeazance of the estate tail."
- Warranty of tenant in tail void against issue, &c.** *Personal actions* *Personal* actions are *ex contractu, vel ex delicto*; being founded upon *contracts*, or for *wrongs* independently of contract^c. Actions upon *contracts* are *Account, Assumpsit, Covenant, Debt, Annuity, and Scire facias*: Actions for *wrongs* are *Case, Detinue, Replevin, and Trespass vi et armis*^d.
- Upon contracts.** **For wrongs.**
- Action of debt on simple contract, against executor or administrator.** It was formerly holden, that an action of *debt* would not lie against an *executor* or *administrator*, upon a simple contract made by the testator or intestate^e, except in *London*, where such an action was maintainable by the custom^f; but where the contract was made by the executor or administrator, an action of *debt* might have been maintained against him^g: And now, by the late act for the further amendment of the law, and better advancement of justice^h, "an action of *debt* on simple contract shall be maintainable, in any court of common law, against any executor or administrator." It should also be observed, as connected with this subject, that, by another clause of the same statuteⁱ, "no wager of law shall be hereafter allowed."
- Wager of law abolished.**

^a 3 Chit. Blac. Com. 171. and see Run. Eject. 2 Ed. 45. Ad. Eject. 3 Ed. 34, &c. 1 Rosc. 43.

^b 2 Chit. Blac. Com. 302. 1 Rosc. 257, &c.

^c 1 Bac. Abr. 26. Gilb. C. P. 5.

^d For the different causes of action comprised under the above heads, see Tidd Prac. 9 Ed. 1, 4, &c.

^e Barry v. Robinson, 1 New Rep. C. P. 293, and the authorities there cited.

^f City of London's case, 8 Co. 126.

Bohun Priv. Lond. 147. 149. 151.

^g Riddell v. Sutton, 5 Bing. 200.

^h 3 & 4 W. IV. c. 42. § 14. and see the third Report of the Common Law Commissioners, pp. 17, 18. 74.

ⁱ 3 & 4 W. IV. c. 42. § 13. And as to wager of law, its antiquity, &c., and the cases in which it was or was not formerly allowable, see 3 Chit. Bl. Com. 341. 1 Chit. Pl. 5 Ed. 128, 9. Tidd Prac. 9 Ed. 649. 3 Rep. C. L. Com. 17, 18. 74. and see Barry v. Robinson,

For *wrongs* independently of contract, the action must in general be brought by the party to whom the injury is done, against the party doing it; and if either of the parties die, the action is gone; for it is a rule that *actio personalis moritur cum persona*^a. But there were some exceptions to this rule, chiefly arising from an equitable construction of the statute 4 Edw. III. c. 7. by which *executors* shall have an action of *trespass*, for a wrong done to their testator^b. And now, by the law amendment act^c, reciting that there is no remedy provided by law for injuries to the *real estate* of any person deceased, committed in his life time, nor for certain wrongs done by a person deceased in his life time to another, in respect of his property *real or personal*; it is enacted, that "an action of *trespass*, or trespass on the *case*, as the case may be, may be maintained by the executors or administrators of any person deceased, for any injury to the *real estate* of such person, committed in his life time, for which an action might have been maintained by such person, so as such injury shall have been committed within *six* calendar months before the death of such deceased person; and provided such action shall be brought within *one* year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person: And further, that an action of *trespass*, or trespass on the *case*, as the case may be, may be maintained *against* the executors or administrators of any person deceased, for any wrong committed by him in his life time to another, in respect of his property *real or personal*, so as such injury shall have been committed within *six* calendar months before such person's death, and so as such action shall be brought within *six* calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration, as the simple contract debts of such person."

Actions for wrongs, by and against whom brought.

By stat. 4 Edw. III. c. 7.

By stat. 3 & 4 W. IV. c. 42. § 2.

Executors, or administrators, may bring actions for injuries to real estate of deceased.

Actions may be brought against executors or administrators, for an injury to property, real or personal, by deceased.

¹ New Rep. C. P. 297. *King v. Williams*, 2 Barn. & C. 538. 4 Dowl. & R. 3. S. C.

^a 1 Wms. Saund. 5 Ed. 216. a. (1.)

^b 2 Bac. Abr. 444, 5. and see *Tidd* Prac. 9 Ed. 9. *Hambly v. Trott*, Cowp.

375. *Wheatley v. Lane*, 1 Wms. Saund. 5 Ed. 217. *Knights v. Quarles*, 4 Moore, 532. 2 Brod. & B. 102. S. C.

^c 3 & 4 W. IV. c. 42. § 2. and see 3 Rep. C. L. Com. 17. 74.

Limitation of
real actions, &c.

It will next be proper to consider the *limitation* of actions, &c. relating to *real* property; and, as connected therewith, the provisions of the statutes 2 & 3 W. IV. c. 71, for shortening the time of prescription in certain cases, and 2 & 3 W. IV. c. 100, for shortening the time required in claims of *modus decimandi*, or exemption from, or discharge of tithes; and afterwards to take a view of the limitation of *personal* actions.

By the com-
mon law.

It seems that, by the common law, there was no stated or fixed time, as to the bringing of actions; for though it was said by *Bracton*^a, that *omnes actiones in mundo infra certa tempora limitationem habent*, and, in another place, *omnis querela et actio injuriarum limitata est infra certa tempora*; yet Lord Coke says, that the limitation of actions was by force of divers acts of parliament^b, and that this general position of *Bracton* admitted of several exceptions^c.

Before stat. 32
Hen. VIII. c.
2.

In a writ of
right.

In possessory
actions.

Before the statute 32 Hen. VIII. c. 2, certain periods were fixed upon, within which titles to lands, &c. must have accrued. Thus, in ancient times, the limitation in a writ of right was from the time of Henry I.; by the statute of *Merton*, (20 Hen. III.) c. 8, from the time of Hen. II.; and by the statute Westm. I. (3 Edw. I.) c. 39, from the time of Rich. I.^d In *possessory* actions, the time of limitation, by the statutes of *Merton* and Westm. I., was successively dated from particular eras; viz. from the return of King *John* from *Ireland*, and from the coronation, &c. of King Henry III.^e

By stat. 32 Hen.
VIII. c. 2.

The limitations above mentioned, being set periods, in process of time of necessity grew too large, whereupon many suits, troubles, and inconveniences did arise; and therefore a more direct and commodious course was taken, which might endure for ever, and calculated to impose diligence and vigilancy in him that was to bring his action, so that by one constant law, certain limitations might serve both for the time present, and for all times to come^f. This was effected by the statute 32 Hen. VIII. c. 2, by which it was enacted, that "no manner of person or persons should sue, have,

Limitation in a
writ of right, or
prescription, &c.
of the ancestor's
seisin or pos-
session.

^a Lib. IV. p. 228. 2 Inst. 95.

^b Co. Lit. 115. a.

^c 2 Inst. 95. And for the history of the limitation of actions in *England*, see Mr. *Angell's* valuable treatise on the Limitation of Actions, &c. in the United States of *North America*, p. 23.

^d 3 Chit. Blac. Com. 195. and see Glanv. l. 2. c. 3. Co. Lit. 114. b.

^e 3 Chit. Blac. Com. 188. and see 2 Inst. 94, 5.

^f 2 Inst. 95. Bac. Abr. tit. Limitation of Actions, B.

CHAP. I.

"or maintain any writ of right, or make any prescription, title, or
 "claim of to or for any manors, lands, tenements, rents, annuities,
 "commons, pensions, portions, corrodies, or other hereditaments,
 "of the possession of his or their ancestor or predecessor, and
 "declare and allege any further seisin or possession of his or their
 "ancestor or predecessor, but only of the seisin or possession of
 "his ancestor or predecessor, which was or should be seised of the
 "said manors, lands, &c. within *threescore* years next before the
 "*teste* of the same writ, or next before the said prescription, title,
 "or claim so thereafter to be sued, commenced, brought, made, or
 "had." ^a

That "no manner of person nor persons should sue, have, Limitation of
 "or maintain, any assise of *mort d'ancestor, cosinage, aiel*, writ of possessory ac-
 "entry upon disseisin done to any of his ancestors or predecessors, tions, of the an-
 "or any other action *possessory*, upon the possession of any of his cestor's seisin or
 "ancestors or predecessors, for any manors, lands, tenements, or possession.
 "other hereditaments, of any further seisin or possession of his or
 "their ancestor or predecessor, but only of the seisin or possession
 "of his or their ancestor or predecessor, which was or should be
 "seised of the same manors, lands, tenements, or other heredita-
 "ments, within *fifty* years next before the *teste* of the original of
 "the same writ." ^b

That "no person nor persons should sue, have, or maintain, Limitation of
 "any action, for any manors, lands, tenements, or other heredita- actions, by per-
 "ments, of or upon his or their own seisin or possession therein, sons of their own
 "above *thirty* years next before the *teste* of the original of the seisin or pos-
 "same writ." ^c session.

That "no person nor persons should make any avowry or Limitation of
 "cognizance, for any rent, suit, or service, and allege any seisin of avowry or cog-
 "any rent, suit, or service, in the same avowry or cognizance, in nizance for rent,
 "the possession of his or their ancestors, or predecessor or pre- suit, or service.
 "decessors, or in his own possession, or in the possession of any
 "other, whose estate he shall pretend or claim to have, above
 "*fifty* * years next before the making of the said avowry or cog-
 "nizance." ^d

^a § 1.

^b § 2.

^c § 3. ^d § 4.

* This is the period mentioned in Berthelet's original edition of the statute,

A.D. 1540: and Cay's, Pickering's, and Ruffhead's editions, examined with the record. Rastell's and other intermediate editions, which Sir *Edward Coke*, (2 Inst. 95. 8 Co. 65.) and other subsequent

Limitation of
formedons in re-
verter or, re-
mainder, and
scire facias upon
fines.

That "all *formedons* in *reverter*, *formedons* in *remainder*,
"and *scire facias* upon fines, of any manors, lands, tenements, or
"other hereditaments, at any time thereafter to be sued, should
"be sued, used, and taken, within *fifty* years next after the title and
"cause of action fallen, and at no time after the said *fifty* years
"passed."^a

Bar to actions,
&c. for default
of seisin, or pos-
session, within
time of limita-
tion.

And "if any person or persons, at any time thereafter, sued any
"of the said actions or writs, for any manors, lands, tenements, or
"other hereditaments, or made any avowry, cognizance, pre-
"scription, title, or claim, of or for any rent, suit, service, or other
"hereditaments, and could not prove that he or they, or his or
"their ancestors or predecessors, were in actual possession or
"seisin of and in the same manors, &c. at any time or times within
"the years before limited and appointed in that act, and in manner
"and form as is aforesaid, if the same were traversed or denied
"by the party plaintiff, demandant, or avowant, or by the party
"tenant or defendant, that then, and after such trial therein had,
"all and every such person and persons, and their heirs, should
"from thenceforth be utterly barred for ever of all and every the
"said writs, actions, avowries, cognizance, prescription, title, or
"claim, thereafter to be sued, had, or made, of and for the same
"manors, lands, tenements, hereditaments, or other the premises,
"or any part of the same, for the which the same action, writ,
"avowry, cognizance, prescription, title, or claim thereafter should
"be at any time had, sued, or made."^b

Savings for
infants, &c.
Copyholds with-
in the statute.

This statute contained the usual savings for infants, feme coverts,
persons in prison, and beyond the seas: And it has been ruled that
copyholds are within the statute, being made for the preservation
of the public quiet, and no ways tending to the prejudice of the
lord or tenant^c. But it did not extend to a *formedon* in the

To what cases
it did not extend.

writers have followed, make it only *forty*
years, for rents, &c. See Com. Dig. tit.
Temps, G. 3. 14. 3 Blac. Com. 189. (z.)

^a § 5.

^b For the construction of this statute,
see Co. Lit. 114, 15. 2 Inst. 95, 6.
Bac. Abr. tit. *Limitation of Actions*, A.
Com. Dig. tit. *Temps*, G. 9, &c. and
Angell Stat. Lim. p. 33, &c., by the pre-
face to which it appears, that the con-

struction of this statute, and that of 21
Jac. I. c. 16. in *England*, has been ge-
nerally adopted by the *American* courts,
in determining questions arising under
their own similar enactments. See also
the learned Reading of Sir Robert Brook,
on the statute 32 Hen. VIII. c. 2., pub-
lished at the end of that work.

^c Moore, 410. and see Bac. Abr. tit.
Limitation of Actions, B.

descender^a; nor to the services of *escuage*, homage, and fealty^a; for a man might live above the time limited by the act: Neither did it extend to any other service, which by common possibility might not have happened, or become due, within *sixty* years, as to cover the hall of the lord, or to attend on the lord when he went to war, or the like^a; nor where the seisin was not traversable, or issuable^a: neither did it extend to a rent created by deed^a, nor to a rent reserved upon any particular estate^a; for, in the one case, the deed was the title, and in the other, the reservation^a; nor (as is expressly declared by the statute 1 Mar. stat. 2. c. 5.) to any writ of right of *advowson*, *quare impedit*, or assise of *darrein presentment*; (for *Ld. Coke* observes, there was a parson in one of his churches, that had been incumbent there above *fifty* years^b;) nor to any writ of right of ward, or ravishment of ward, &c.; but they were left as they were before the statute of 32 Hen. VIII.^a

By the statute 21 Jac. I. c. 16. § 1, for the quieting of men's estates, and avoiding of suits, it was enacted, that "all writs of "*formedon in descender*, *formedon in remainder*, and *formedon in reverter*, of any manors, lands, tenements, or other hereditaments whatsoever, at any time thereafter to be sued or brought by occasion or means of any title or cause thereafter happening, should be sued and taken within *twenty* years next after the title and cause of action first descended or fallen, and at no time after the said *twenty* years: And that no person or persons should at any time thereafter make any entry into any lands, tenements, or hereditaments, but within *twenty* years next after his or their right or title which should first descend or accrue to the same; and in default thereof, such person so not entering, and their heirs, should be utterly excluded and disabled from such entry after to be made, any former law or statute to the contrary notwithstanding." The action of *ejectment*, being founded on a right of entry, must by this statute be brought, in case of an adverse possession, within *twenty* years after the right of entry

Limitation of writs of *formedon*, in *descender*, *remainder*, and *reverter*.

Entry into lands, &c. to be made within *twenty* years.

Ejectment, when brought.

^a Co. Lit. 115. and see 2 Inst. 95, 6. Bac. Abr. tit. *Limitation of Actions*, B. Com. Dig. tit. *Temps*, G. 9. &c.

^b Sir *William Blackstone* observes, on this passage, that instances are not wanting, wherein two successive incumbents have continued for upwards of a *hundred*

years; and states, as an instance, that two successive incumbents of the rectory of *Chelsfield* cum *Farnborough*, in *Kent*, continued 101 years; of whom the former was admitted in 1650, the latter in 1700 and died in 1751. 3 Chit. Blac. Com. 250.

Action, for avoiding fine with proclamations, must be commenced within one year, and prosecuted with effect.

Proviso in favour of infants, *femes covert*, and persons *non compos mentis*, imprisoned, or beyond the seas.

Limitation of actions, &c. by stat. 3 & 4 W. IV. c. 27.

No land or rent to be recovered, but within twenty years after the right of action, &c. accrued to the claimant, or some person through whom he claims.

accrued. And, by the statute 4 Anne, c. 16^a, "no claim "or entry to be made of or upon any lands, tenements, or "hereditaments, shall be of any force or effect, to avoid any *fine* "levied, or to be levied, with proclamations, or shall be a sufficient "entry or claim within the statute 21 Jac. I. c. 16, unless, upon "such entry or claim, an action shall be commenced within *one* "year next after the making of such entry or claim, and prosecuted with effect."

There is a *proviso*, however, in the statute 21 Jac. I. c. 16. § 2. that "if any person or persons, that is or shall be entitled to such "writ or writs, or that hath or shall have such right or title of "entry, be, or shall be, at the time of the said right or title first "descended, accrued, come, or fallen, within the age of *one* and "twenty years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, that then such person and persons, and his and "their heir and heirs, shall or may, notwithstanding the said *twenty* "years be expired, bring his action, or make his entry, as he might "have done before that act, so as such person and persons, or his "or their heir and heirs, shall, within *ten* years next after his and "their full age, discoverture, coming of sound mind, enlargement "out of prison, or coming into this realm, or death, take benefit "of and sue for the same, and at no time after the said *ten* years."

At length, by the statute 3 & 4 W. IV. c. 27. for the limitation of actions and suits relating to real property, &c. it is enacted, that "after the 31st day of *December* 1833, no person shall make an "entry^b, or distress^b, or bring an *action* to recover any land or rent, "but within *twenty* years next after the time at which the right to "make such entry or distress, or to bring such action, shall have "first accrued to some person through whom he claims; or, if "such right shall not have accrued to any person through whom "he claims, then within *twenty* years next after the time at which the

^a § 16. and see 3 Chit. Blac. Com. 177, 8.

^b This statute, it will be observed, is not confined to the limitation of *actions*, but extends also to the making of *entries* and *distresses*, which are put upon the same footing as the bringing of actions. The only previous statute, for limiting the time for making *entries*, was the 21 Jac. c. I. § 1., by which, we have seen,

(*Ante*, 19.) the right to make an entry into lands, &c. was limited to *twenty* years next after the right or title first descended or accrued: And by the statute 32 Hen. VIII. c. 2. § 4. (being the only statute which limited the time of making *distresses*,) an avowry or cognizance might have been made for any rent, suit, or service, within *fifty* years next before the making thereof.

"right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same."^a

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In the construction of this act, it is enacted, that "the right to make an entry, or distress, or bring an action, to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession, or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession, or discontinuance of possession, or at the

When the right shall be deemed to have accrued.

In case of an estate in possession:

on dispossession, &c.

^a § 2. By the first section of the above act, "the words and expressions hereinafter mentioned, which, in their ordinary signification, have a more confined, or a different meaning, shall, in that act, except where the nature of the provision, or the context of the act, shall exclude such construction, be interpreted as follows; that is to say, the word "*land*" shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes, (other than tithes belonging to a spiritual, or eleemosynary corporation sole,) and also to any share, estate, or interest in them, or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure; and the word "*rent*" shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities, and periodical sums of money charged upon or payable out of any land, (except *moduses*, or compositions belonging to a spiritual, or eleemosynary corporation sole;) and the *person*, through whom another person is said to claim, shall mean any person by, through, or under, or by the act of whom, the person so claiming became entitled to the estate

or interest claimed, as heir, issue in tail, tenant by the curtesy of *England*, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise, and also any person who was entitled to an estate or interest, to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat; and the word "*person*" shall extend to a body politic, corporate, or collegiate, and to a class of creditors, or other persons, as well as an individual; and every word importing the *singular* number only, shall extend and be applied to *several* persons or things, as well as *one* person or thing; and every word importing the *masculine* gender only, shall extend and be applied to a *female*, as well as a male." The former statutes of limitation did not extend to a *corporation aggregate*, as mayor and commonalty, &c.; for they did not count upon a *seisin* of any ancestor or predecessor, but upon their own possession; Bro. Abr. tit. Stat. Lim. 33. But if a bishop, or other *sole* corporation, sued upon a *seisin* of his predecessor, he was barred, if the *seisin* were not within *sixty* years. *Id. ib.* and see Com. Dig. tit. *Temps*, G. 1. 11.

- CHAP. I. "last time at which any such profits, or rent, were or was so received : And when the person claiming such land or rent, shall claim the estate or interest of some deceased person, who shall have continued in such possession or receipt, in respect of the same estate or interest, until the time of his death, and shall have been the last person entitled to such estate or interest, who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death :
- on abatement ;
- on alienation ; " And when the person claiming such land or rent, shall claim in respect of an estate or interest in possession, granted, appointed, or otherwise assured by any instrument, (other than a will,) to him, or some person through whom he claims, by a person being, in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt, by virtue of such instrument : And
- In case of future estates. " when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent, in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession : And when the
- In case of forfeiture, or breach of condition. " person claiming such land or rent, or the person through whom he claims, shall have become entitled, by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued, when such forfeiture was incurred, or such condition was broken."^a
- Where advantage of forfeiture is not taken by remainderman, he shall have a new right, when his estate comes into possession. Provided always, that " when any right to make an entry or distress, or to bring an action, to recover any land or rent, by reason of any forfeiture or breach of condition, shall have first accrued, in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress, or bring an action, to recover such land or rent, shall be deemed to have first accrued, in respect of such estate or interest, at the

^a § 3.

"time when the same shall have become an estate or interest in possession, as if no such forfeiture, or breach of condition, had happened."^a

Provided also, that "a right to make an entry or distress, or to bring an action, to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession, by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof, or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall, at any time previously to the creation of the estate or estates which shall have determined, have been in possession, or receipt of the profits of such land, or in receipt of such rent."^b

Reversioner, when to have a new right.

And it is thereby further enacted, that "for the purposes of this act, an administrator claiming the estate or interest of the deceased person, of whose chattels he shall be appointed administrator, shall be deemed to claim, as if there had been no interval of time between the death of such deceased person, and the grant of the letters of administration."^c

Administrator to claim, as if he obtained the estate without interval, after death of deceased.

That "when any person shall be in possession, or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled, subject thereto, or of the person through whom he claims, to make an entry or distress, or bring an action, to recover such land or rent, shall be deemed to have first accrued, either at the determination of such tenancy, or at the expiration of *one* year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: Provided always, that no mortgage, or *cestui que* trust, shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee."^d

In case of a tenant at will, the right shall be deemed to have accrued at the end of one year.

That "when any person shall be in possession, or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year, or other period, without any lease in writing, the right of the person entitled, subject thereto, or of the person through whom he claims, to make an entry or distress, or to

No person, after a tenancy from year to year, to have any right, but from the end of the first year, or last payment of rent.

^a § 4.

^c § 6.

^b § 5.

^d § 7.

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"bring an action, to recover such land or rent, shall be deemed
 "to have first accrued, at the determination of the first of such
 "years or other periods, or at the last time when any rent payable
 "in respect of such tenancy, shall have been received, which shall
 "last happen."^a

Where rent amounting to 20s. reserved by a lease in writing, shall have been wrongfully received, no right to accrue on the determination of the lease.

That "when any person shall be in possession, or in receipt of
 "the profits of any land, or in receipt of any rent, by virtue of a
 "lease in writing, by which a rent, amounting to the yearly sum of
 "twenty shillings or upwards, shall be reserved, and the rent reserved
 "by such lease shall have been received by some person wrongfully
 "claiming to be entitled to such land or rent in reversion, immediately
 "expectant on the determination of such lease, and no payment, in
 "respect of the rent reserved by such lease, shall afterwards have
 "been made to the person rightfully entitled thereto, the right of the
 "person entitled to such land or rent, subject to such lease, or of the
 "person through whom he claims, to make an entry or distress, or
 "to bring an action, after the determination of such lease, shall be
 "deemed to have first accrued at the time at which the rent reserved
 "by such lease was first so received, by the person wrongfully claim-
 "ing as aforesaid; and no such right shall be deemed to have first
 "accrued, upon the determination of such lease, to the person right-
 "fully entitled."^b

Receipt of rent to be deemed receipt of profits.

And it is thereby further enacted, that "the receipt of the rent
 "payable by any tenant from year to year, or other lessee, shall, as
 "against such lessee, or any person claiming under him, (but subject
 "to the lease,) be deemed to be the receipt of the profits of the land,
 "for the purposes of this act."^c

A mere entry not to be deemed possession; and no right of entry, &c. to be preserved by continual claim.

That "no person shall be deemed to have been in possession of
 "any land, within the meaning of this act, merely by reason of
 "having made an entry thereon."^d And that "no continual or
 "other claim, upon or near any land, shall preserve any right of
 "making an entry or distress, or of bringing an action."^e

^a § 8.

^b § 9.

^c § 35. This section has been transposed, on account of its near connexion with the subject matter of the preceding ones.

^d § 10.

^e § 11. Previously to the enactments in this and the next preceding section, an

actual entry made by one who had a legal right to enter on an estate, or by his agent duly authorized by power of attorney, if made peaceably, and repeated once in the space of every year and a day, (which was called *continual claim*,) was deemed sufficient to prevent the right of entry from being tolled by a descent

That "when any one or more of several persons entitled to any land or rent, as coparceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons, other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons, or any of them."^a

Possession of one coparcener, joint tenant, or tenant in common, not to be the possession of the others.

That "when a younger brother, or other relation, of the person entitled as heir, to the possession, or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir."^b

Possession of a younger brother not to be the possession of the heir.

Provided always, that "when any acknowledgment of the title of the person entitled to any land or rent, shall have been given to him, or his agent, in writing, signed by the person in possession, or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt, of or by the person by whom such acknowledgment shall have been given, shall be deemed, according to the meaning of this act, to have been the possession or receipt of or by the person to whom, or to whose agent, such acknowledg-

Acknowledgment in writing, given to the person entitled or his agent, to be equivalent to possession, or receipt of rent.

cast, or discontinuance, or barred by the statute of limitations. Run. Eject. 2 Ed. 51, 2. Ad. Eject. 3 Ed. 101. and see *Ford v. Grey*, 1 Salk. 285. 2 Chit. Blac. Com. 312. 3 Chit. Blac. Com. 174.

^a § 12. The possession of one coparcener, joint tenant, or tenant in common, was formerly considered as the possession of the others, so as to prevent the operation of the statutes of limitations, (Bac. Abr. tit. *Limitation of Actions*, B. *Ford v. Grey*, 1 Salk. 285. *Reading v. Royston*, *Id.* 423. 2 Ld. Raym. 829. *S. C. Peaceable v. Read*, 1 East, 568. *Doe d. Gill v. Pearson*, 6 East, 173. Run. Eject. 2 Ed. 61. Ad. Eject. 3 Ed. 100. 1 Rosc. 85. *Tidd Prac.* 9 Ed. 1199.) unless an actual ouster of the latter could have been proved; (*Davenport*

v. Tyrrel, 1 Blac. Rep. 675.) or circumstances, from which such an ouster might have been presumed by a jury. *Doe v. Prosser*, Cowp. 217. *Doe d. Hellings v. Bird*, 11 East, 49. 1 Rosc. 85. *Angell Stat. Lim.* 91, &c.

^b § 13. Previously to the above enactment, if a younger son had entered by abatement, after the death of his father, and died seised, the descent would not have tolled the entry of the eldest son, who claimed by the same title; for it was intended that the younger son claimed as heir: and this was also the case, although the younger son was only of the half blood; (Lit. § 396. Co. Lit. 242. b.) or if he entered by intrusion. Co. Lit. 243. a. and see 1 Rosc. 84.

CHAP. I.

Where possession is not adverse at the time of passing the act, the right shall not be barred, until the end of five years afterwards.

Persons under disability of infancy, lunacy, coverture, or beyond seas, and their representatives, to be allowed ten years from the termination of their disability, or death.

But no action, &c. shall be brought beyond forty years after the right of action &c. accrued.

"ment shall have been given, at the time of giving the same; and the
"right of such last-mentioned person, or any person claiming through
"him, to make an entry or distress, or bring an action, to recover
"such land or rent, shall be deemed to have first accrued at, and
"not before, the time at which such acknowledgment, or the last of
"such acknowledgments, if more than one, was given."^a

Provided also, that "when no such acknowledgment as aforesaid shall have been given, before the passing of this act, and the
"possession or receipt of the profits of the land, or the receipt of the
"rent, shall not, at the time of the passing of this act, have been
"adverse to the right or title of the person claiming to be entitled
"thereto, then such person, or the person claiming through him,
"may, notwithstanding the period of *twenty* years thereinbefore
"limited shall have expired, make an entry or distress, or bring an
"action, to recover such land or interest, at any time within *five*
"years next after the passing of this act."^b

Provided always, that "if at the time at which the right of any
"person to make an entry or distress, or bring an action, to recover
"any land or rent, shall have first accrued as aforesaid, such person
"shall have been under any of the disabilities hereinafter mentioned, (that is to say,) infancy, coverture, idiocy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or
"the person claiming through him, may, notwithstanding the period
"of *twenty* years thereinbefore limited shall have expired, make an
"entry or distress, or bring an action, to recover such land or rent,
"at any time within *ten* years next after the time at which the
"person to whom such right shall first have accrued as aforesaid,
"shall have ceased to be under any such disability, or shall have
"died, which shall first have happened."^c

Provided nevertheless, that "no entry, distress, or action, shall
"be made or brought by any person who, at the time at which his
"right to make an entry or distress, or to bring an action, to recover any land or rent, shall have first accrued, shall be under any
"of the disabilities thereinbefore mentioned, or by any person
"claiming through him, but within *forty* years next after the time
"at which such right shall have first accrued, although the person
"under disability at such time, may have remained under one or
"more of such disabilities, during the whole of such *forty* years,

^a § 14.

^c § 16.

^b § 15.

"or although the term of *ten* years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired." ^a

Provided always, that "when any person shall be under any of the disabilities thereinbefore mentioned, at the time at which his right to make an entry or distress, or to bring an action, to recover any land or rent, shall have first accrued, and shall depart this life, without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action, to recover such land or rent, beyond the said period of *twenty* years next after the right of such person to make an entry or distress, or to bring an action, to recover such land or rent, shall have first accrued, or the said period of *ten* years next after the time at which such person shall have died, shall be allowed, by reason of any disability of any other person." ^b

No further time to be allowed, for a succession of disabilities.

And that "no part of the united kingdom of *Great Britain* and *Ireland*, nor the islands of *Man*, *Guernsey*, *Jersey*, *Alderney*, or *Sark*, nor any island adjacent to any of them, (being part of the dominions of his Majesty,) shall be deemed to be beyond seas, within the meaning of this act." ^c

Scotland, Ireland, and the adjacent Islands, not to be deemed beyond seas.

And it is thereby further enacted, that "when the right of any person to make an entry or distress, or bring an action, to recover any land or rent, to which he may have been entitled for an estate or interest in possession, shall have been barred by the determination of the period thereinbefore limited, which shall be applicable in such case, and such person shall at any time during the said period have been entitled to any other estate, interest, right, or possibility, in reversion, remainder, or otherwise, in or to the same land or rent, no entry, distress, or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right, or possibility, unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest, or right, which shall have been limited, or taken effect, after or in defeasance of such estate or interest in possession." ^d

When the right to an estate in possession is barred, the right of the same person, to future estates, shall also be barred.

That "when the right of a tenant in tail of any land or rent, to make an entry or distress, or to bring an action, to recover the same, shall have been barred, by reason of the same not having been made or brought within the period thereinbefore limited, which

Where tenant in tail is barred, remainder-men, whom he might have barred, shall not recover.

^a § 17.

^c § 19.

^b § 18.

^d § 20.

CHAP. I. " shall be applicable in such case, no such entry, distress, or action
 " shall be made or brought by any person claiming any estate, interest,
 " or right, which such tenant in tail might lawfully have barred."^a

Possession ad-
 verse to a ten-
 ant in tail,
 shall run on
 against the re-
 mainder-men,
 whom he might
 have barred.

That " when a tenant in tail of any land or rent, entitled to re-
 " cover the same, shall have died before the expiration of the period
 " thereinbefore limited, which shall be applicable in such case, for
 " making an entry or distress, or bringing an action, to recover such
 " land or rent, no person claiming any estate, interest, or right, which
 " such tenant in tail might lawfully have barred, shall make an entry
 " or distress, or bring an action, to recover such land or rent, but
 " within the period during which, if such tenant in tail had so long
 " continued to live, he might have made such entry or distress, or
 " brought such action."^b

Where there
 shall have been
 possession, un-
 der an assur-
 ance by a ten-
 ant in tail,
 which shall not
 bar the remain-
 ders, they shall
 be barred at the
 end of twenty
 years after the
 time when the
 assurance, if
 then executed,
 would have
 barred them.

And that " when a tenant in tail of any land or rent shall have
 " made an assurance thereof, which shall not operate to bar an estate
 " or estates to take effect after or in defeasance of his estate tail, and
 " any person shall, by virtue of such assurance, at the time of the
 " execution thereof, or at any time afterwards, be in possession or
 " receipt of the profits of such land, or in the receipt of such rent,
 " and the same person, or any other person whatsoever, (other than
 " some person entitled to such possession or receipt, in respect of
 " an estate which shall have taken effect after or in defeasance of
 " the estate tail,) shall continue or be in such possession or receipt,
 " for the period of *twenty* years next after the commencement of
 " the time at which such assurance, if it had then been executed by
 " such tenant in tail, or the person who would have been entitled to his
 " estate tail, if such assurance had not been executed, would, without
 " the consent of any other person, have operated to bar such estate
 " or estates as aforesaid, then, at the expiration of such period of
 " *twenty* years, such assurance shall be, and be deemed to have been
 " effectual, as against any person claiming any estate, interest, or
 " right, to take effect after or in defeasance of such estate tail."^c

No lands, or
 rents, to be re-
 covered by ec-

Provided always, that " it shall be lawful for any archbishop,
 " bishop, dean, prebendary, parson, vicar, master of hospital, or other

^a § 21.

^b § 22.

^c § 23. Ecclesiastical persons were not bound by any of the statutes of limitations; because it would have been a side wind to evade the statutes made to prohibit their alienations. Comp. Incumb. 429. and see Bac. Abr. tit. *Limit-*

ation of Actions, B. Ballantine, 19. Ad. Eject. 3 Ed. 46. And writs of right of advowson, *quare impedit*, and assise of *darrein presentment*, &c., we have seen, (*ante*, 19.) were excepted out of the statute 32 Hen. VIII. c. 2. by 1 Mar. stat. 2. c. 5.

“spiritual or eleemosynary corporation sole, to make an entry or distress, or to bring an action or suit, to recover any land or rent, within such period as hereinafter is mentioned, next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress, or bring such action or suit, shall first have accrued; (that is to say,) the period during which *two* persons in succession shall have held the office or benefice, in respect whereof such land or rent shall be claimed, and *six* years after a third person shall have been appointed thereto, if the times of such *two* incumbencies, and such term of *six* years, taken together, shall amount to the full period of *sixty* years; and if such times, taken together, shall not amount to the full period of *sixty* years, then during such further number of years, in addition to such *six* years, as will, with the time of the holding of such *two* persons, and such *six* years, make up the full period of *sixty* years; and after the said thirty-first day of *December* one thousand eight hundred and thirty-three, no such entry, distress, action, or suit, shall be made or brought, at any time beyond the determination of such period.”^a

clesiastical or eleemosynary corporations sole, but within two incumbencies, and six years, or sixty years.

And it is thereby further enacted, that “after the said thirty-first day of *December* one thousand eight hundred and thirty-three, no person shall bring any *quare impedit*, or other action, or any suit, to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice, as the patron thereof, after the expiration of such period as hereinafter is mentioned; (that is to say,) the period during which *three* clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies, taken together, shall amount to the full period of *sixty* years; and if the times of such incumbencies shall not together amount to the full period of *sixty* years, then after the expiration of such further time as, with the times of such incumbencies, will make up the full period of *sixty* years.”^b

No advowson to be recovered, but within three incumbencies, or sixty years.

Provided always, that “when, on the avoidance, after a clerk shall have obtained possession of an ecclesiastical benefice, adversely

Incumbencies after lapse, to be reckoned within

^a § 29. This and the five following sections, relating principally to actions or proceedings at *law*, have been transposed,

so as to make them precede those which relate to suits in *equity*, &c.

^b § 30.

the period, but not incumbencies after promotions to bishopricks.

When person claiming an advowson in remainder, &c. after an estate tail, shall be barred.

No advowson to be recovered after 100 years.

At the end of the period of limitation, the right of the party out of possession to be extinguished.

“ to the right of presentation or gift of the patron thereof, a clerk shall be presented or collated thereto by his Majesty, or the ordinary, by reason of a lapse, such last-mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid; but when a clerk shall have been presented by his Majesty, upon the avoidance of a benefice, in consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk shall, for the purposes of this act, be deemed a continuation of the incumbency of the clerk so made bishop.”^a

And it is thereby further enacted, that “ in the construction of this act, every person claiming a right to present to, or bestow any ecclesiastical benefice, as patron thereof, by virtue of any estate, interest, or right, which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such estate tail; and the right to bring any *quare impedit*, action, or suit, shall be limited accordingly.”^b

Provided always, that “ after the said thirty-first day of *December* one thousand eight hundred and thirty-three, no person shall bring any *quare impedit*, or other action, or any suit, to enforce a right to present to or bestow any ecclesiastical benefice, as the patron thereof, after the expiration of *one hundred* years from the time at which a clerk shall have obtained possession of such benefice, adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest, or undivided share, or alternate right of presentation or gift, held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice, on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share, or right, held or derived under the same title.”^c

And that “ at the determination of the period limited by this act to any person, for making an entry or distress, or bringing any writ of *quare impedit*, or other action or suit, the right and title of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action, or suit respectively, might have been made or brought within such period, shall be extinguished.”^d

^a § 31.

^b § 32.

^c § 33.

^d § 34.

And it is thereby further enacted, that “after the said thirty-first day of *December* one thousand eight hundred and thirty-three, no person claiming any land or rent in equity, shall bring any suit to recover the same, but within the period during which, by virtue of the provisions thereinbefore contained, he might have made an entry or distress, or brought an action, to recover the same respectively, if he had been entitled at law to such estate, interest, or right, in or to the same, as he shall claim therein in equity.”^a

No suit in equity to be brought after the time when the plaintiff, if entitled at law, might have brought an action.

Provided always, that “when any land or rent shall be vested in a trustee, upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this act, at, and not before, the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser, and any person claiming through him.”^b

In cases of express trust, the right shall not be deemed to have accrued until a conveyance to a purchaser.

And it is thereby further enacted, that “in every case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any land or rent, of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at, and not before, the time at which such fraud shall, or with reasonable diligence might have been first known or discovered; provided that nothing in this clause contained, shall enable any owner of lands or rents, to have a suit in equity, for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud, against any *bonâ fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who, at the time that he made the purchase, did not know, and had no reason to believe, that any such fraud had been committed.”^c

In cases of fraud, no time shall run whilst the fraud remains concealed.

Provided always, that “nothing in this act contained shall be deemed to interfere with any rule or jurisdiction of courts of equity, in refusing relief on the ground of acquiescence, or otherwise, to any person whose right to bring a suit may not be barred by virtue of this act.”^d

Saving the jurisdiction of equity, on the ground of acquiescence, or otherwise.

And it is thereby further enacted, that “when a mortgagee shall have obtained the possession, or receipt of the profits, of any

Mortgagor to be barred at the end of

^a § 24.

^c § 26.

^b § 25.

^d § 27.

twenty years
from the time
when the mort-
gagee took pos-
session, or from
the last written
acknowledg-
ment.

“ land, or the receipt of any rent, comprised in his mortgage, the
 “ mortgagor, or any person claiming through him, shall not bring a
 “ suit to redeem the mortgage, but within *twenty* years next after the
 “ time at which the mortgagee obtained such possession or receipt,
 “ unless in the meantime an acknowledgment of the title of the
 “ mortgagor, or of his right of redemption, shall have been given to
 “ the mortgagor, or some person claiming his estate, or to the agent
 “ of such mortgagor or person, in writing, signed by the mortgagee,
 “ or the person claiming through him; and in such case no such suit
 “ shall be brought, but within *twenty* years next after the time at
 “ which such acknowledgment, or the last of such acknowledgments,
 “ if more than one, was given; and when there shall be more than
 “ one mortgagor, or more than one person claiming through the
 “ mortgagor or mortgagors, such acknowledgment, if given to any
 “ of such mortgagors or persons, or his or their agent, shall be as
 “ effectual as if the same had been given to all such mortgagors or
 “ persons: but where there shall be more than one mortgagee, or
 “ more than one person claiming the estate or interest of the mort-
 “ gagee or mortgagees, such acknowledgment, signed by one or
 “ more of such mortgagees or persons, shall be effectual only as
 “ against the party or parties, signing as aforesaid, and the person or
 “ persons claiming any part of the mortgage money, or land or rent,
 “ by from or under him or them, and any person or persons entitled
 “ to any estate or estates, interest or interests, to take effect after or
 “ in defeasance of his or their estate or estates, interest or interests;
 “ and shall not operate to give to the mortgagor or mortgagors a
 “ right to redeem the mortgage, as against the person or persons
 “ entitled to any other undivided or divided part of the money, or
 “ land or rent: And where such of the mortgagees or persons aforesaid
 “ as shall have given such acknowledgment, shall be entitled to a
 “ divided part of the land or rent comprised in the mortgage, or
 “ some estate or interest therein, and not to any ascertained part of
 “ the mortgaged money, the mortgagor, or mortgagors, shall be en-
 “ titled to redeem the same divided part of the land or rent, on pay-
 “ ment, with interest, of the part of the mortgage money, which
 “ shall bear the same proportion to the whole of the mortgage money,
 “ as the value of such divided part of the land or rent shall bear to
 “ the value of the whole of the land or rent comprised in the mort-
 “ gage.”^a

^a § 28.

That “ after the said 31st day of *December* 1833, no action or suit, or other proceeding, shall be brought, to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within *twenty* years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case, no such action or suit, or proceeding, shall be brought, but within *twenty* years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given.”^a

Money charged upon land, and legacies, to be deemed satisfied at the end of twenty years, if there shall be no interest paid, or acknowledgment in writing, in the meantime.

That “ after the said 31st day of *December* 1833, no arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained, by any action or suit, for a longer period than *six* years next before the commencement of such action or suit.”^b

No arrears of dower to be recovered for more than six years.

That “ after the said 31st day of *December* 1833, no arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within *six* years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: Provided nevertheless, that where any prior mortgagee, or other incumbrancer, shall have been in possession of any land, or in the receipt of the profits thereof, within *one* year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit, the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such

No arrears of rent, or interest, to be recovered for more than six years.

^a § 40.

^b § 41. *Ante*, 11.

CHAP. I. "possession or receipt as aforesaid, although such time may have exceeded the said term of *six* years."^a

Act to extend to spiritual courts.

And that "after the said 31st day of *December* 1833, no person claiming any tithes, legacy, or other property, for the recovery of which he might bring an action or suit at law or in equity, shall bring a suit, or other proceeding, in any spiritual court, to recover the same, but within the period during which he might bring such action or suit at law or in equity."^b

Not to extend to Scotland, nor to advowsons in Ireland.

Provided always, that "this act shall not extend to *Scotland*; and shall not, so far as it relates to any right to *permit*^c to, or bestow any church, vicarage, or other ecclesiastical benefice, extend to *Ireland*."^d

King, when bound, or not, by statutes of limitations.

The *King*, not being named in the statute 32 Hen. VIII. c. 2,^e or 21 Jac. I. c. 16^f, was not bound by either of these statutes; and, for a similar reason, he is not bound by the statute 3 & 4 W. IV. c. 27, for the *limitation* of actions, relating to real property, &c.: But he is expressly named in, and bound by the statutes 2 & 3 W. IV. c. 71, for shortening the time of *prescription* in certain cases, and 2 & 3 W. IV. c. 100, for shortening the time required in claims of *modus decimandi*, &c.; which also extend to lands being parcel of the duchy of *Lancaster*, or *Cornwall*: And, by the statute 21 Jac. I. c. 2, a time of limitation was extended generally to the case of the *King*; viz. *sixty* years precedent to 19th *February* 1623^g; but, this becoming ineffectual by efflux of time, the same date of limitation was fixed by the statute 9 Geo. III. c. 16, to commence and be reckoned backwards, from the time of bringing any suit or other process, to recover the thing in question; so that a possession for *sixty* years is now a bar, even against the prerogative, in derogation of the ancient maxim, "*nullum tempus occurrit regi*."^h

^a § 42.

^b § 43.

^c Run. Eject. 2 Ed. 56. Ad. Eject.

^d Sic, in printed copy of act, instead of present.

3 Ed. 46.

^e 3 Inst. 189.

^f § 44.

^g 3 Chit. Blac. Com. 306, 7. and see

^h Bro. Abr. tit. Stat. Lim. 67. and see Stanf. Prærog. 42. b. Com. Dig. tit.

Run. Eject. 2 Ed. 56. Ad. Eject. 3 Ed. 46.

Temps, G. 11.

It will next be proper to notice, as connected with the *limitation* of actions, &c., the provisions of the statutes 2 & 3 W. IV. c. 71, for shortening the time of *prescription* in certain cases, and 2 & 3 W. IV. c. 100, for shortening the time required in claims of *modus decimandi*, or exemptions from, or discharge of tithes.

Stat. 2 & 3 W.
IV. c. 71. &
c. 100.

Before the making of the former of these statutes, as appears by the preamble thereto, the expression 'time immemorial,' or 'time whereof the memory of man runneth not to the contrary,' was, by the law of *England*, in many cases, considered to include and denote the whole period of time from the reign of King *Richard the first*, whereby the title to matters that had been long enjoyed was sometimes defeated, by shewing the commencement of such enjoyment, which was in many cases productive of inconvenience and injustice. And, in pleading a right of common by prescription, the party must formerly have shewn a seisin in *fee* of the land in respect of which he claimed, and prescribed in a *que* estate for the right: Therefore, where a defendant justified under a right of common of pasture, by shewing a demise from a freeholder for *life*, of the land in respect of which he claimed, and averred that he, the defendant, and all those whose estate he then had, and his landlord, from time whereof, &c., had common of pasture in respect of the demised premises, the court of Exchequer held, upon demurrer, that the plea was bad^a. But now, by the above statute^b, it is enacted, that "no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any *right of common*, or other profit or benefit, to be taken and enjoyed from or upon any land of our sovereign lord the king, his heirs or successors, or any land being parcel of the duchy of *Lancaster*, or of the duchy of *Cornwall*, or of any ecclesiastical or lay person, or body corporate, except such matters and things as are therein specially provided for, and except tithes, rent, and services, shall, where such right, profit or benefit, shall have been actually taken and enjoyed by any person claiming right thereto, without interruption, for the full period of *thirty* years, be defeated or destroyed, by shewing only that such right, profit or benefit, was first taken or enjoyed, at any time prior to such period of *thirty* years; but

Preamble to
former of these
statutes.

Periods of limitation for claims to rights of common, and other profits *d prebende*.

^a Attorney-General v. Gauntlett, 3 Young & J. 93. And for the mode of setting forth a title to *incorporeal* hereditaments, previously to the above statute, see Tidd *Prac.* 9 Ed. 443. and the authorities there referred to.

^b § 1.

CHAP. I. “nevertheless, such claim may be defeated in any other way, by
 “which the same is now liable to be defeated: And when such
 “right, profit or benefit, shall have been so taken and enjoyed as
 “aforesaid, for the full period of *sixty* years, the right thereto
 “shall be deemed absolute and indefeasible; unless it shall appear
 “that the same was taken and enjoyed by some consent or agree-
 “ment, expressly made or given for that purpose, by deed or
 “writing.”

For claim to
 right of way, or
 other easement,
 or watercourse,
 &c.

And it is thereby further enacted, that “no claim, which may
 “be lawfully made at the common law, by custom, prescription,
 “or grant, to any *way*, or other easement, or to any *watercourse*, or
 “the use of any *water*, to be enjoyed or derived upon, over, or
 “from any land or water of our said lord the king, his heirs or
 “successors, or being parcel of the duchy of *Lancaster*, or of the
 “duchy of *Cornwall*, or being the property of any ecclesiastical
 “or lay person, or body corporate, when such *way* or other matter
 “as therein last before mentioned shall have been actually enjoyed
 “by any person claiming right thereto, without interruption, for
 “the full period of *twenty* years, shall be defeated or destroyed, by
 “shewing only that such *way*, or other matter, was first enjoyed at
 “any time prior to such period of *twenty* years; but nevertheless,
 “such claim may be defeated in any other way, by which the
 “same is now liable to be defeated: And where such *way*, or other
 “matter as therein last before mentioned, shall have been so en-
 “joyed as aforesaid, for the full period of *forty* years, the right
 “thereto shall be deemed absolute and indefeasible; unless it shall
 “appear that the same was enjoyed by some consent or agreement,
 “expressly given or made for that purpose, by deed or writing.”^a

For claim to use
 of light.

That “when the access and use of *light* to and for any dwell-
 “ing house, work-shop, or other building, shall have been actually
 “enjoyed therewith for the full period of *twenty* years, without
 “interruption, the right thereto shall be deemed absolute and in-
 “defeasible, any local usage or custom to the contrary notwith-
 “standing, unless it shall appear that the same was enjoyed by
 “some consent or agreement, expressly made or given for that
 “purpose, by deed or writing.”^b

Periods of limit-
 ation, how
 reckoned.

That “each of the respective periods of years thereinbefore
 “mentioned shall be deemed and taken to be the period next be-
 “fore some suit or action, wherein the claim or matter to which

^a § 2.

^b § 3.

"such period may relate, shall have been, or shall be brought into question; and that no act, or other matter, shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been, or shall be submitted to or acquiesced in, for *one* year after the party interrupted shall have had, or shall have notice thereof, and of the person making, or authorizing the same to be made."^a

CHAP. I.

What shall not be deemed an interruption.

That "in all actions upon the *case*, and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient; and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence, to sustain or rebut such allegation: And that in all pleadings to actions of *trespass*, and in all other pleadings, wherein, before the passing of this act, it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right, by the occupiers of the tenement in respect whereof the same is claimed, for and during such of the periods mentioned in this act, as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any *proviso*, exception, incapacity, disability, contract, agreement, or other matter thereinbefore mentioned, or on any cause or matter of fact, or of law, not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth, in answer to the allegation of the party claiming, and shall not be received in evidence, on any general traverse or denial of such allegation."^b

Right, how alleged by claimant, in actions upon the case, &c.

In pleadings to actions of trespass, &c.

That "in the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed, for any less period of time or number of years, than for such period or number mentioned in this act, as may be applicable to the case, and to the nature of the claim."^c

Restriction of presumption to be allowed in support of claims.

^a § 4.

^c § 6.

^b § 5.

Proviso for infants, &c.

“ Provided, that the time during which any person, otherwise capable of resisting any claim to any of the matters before mentioned, shall have been, or shall be, an infant, idiot, *non compos mentis*, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods thereinbefore mentioned, except only in cases where the right or claim is thereby declared to be absolute and inde-
feasible.”^a

When land, or water, shall have been held for term of life, &c.

“ Provided always, that when any land or water, upon, over or from which any such way, or other convenient water-course, or use of water, shall have been, or shall be, enjoyed or derived, hath been, or shall be, held under or by virtue of any term of life, or any term of years exceeding *three* years from the granting thereof, the time of the enjoyment of any such way, or other matter as therein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of *forty* years, in case the claim shall, within *three* years next after the end or sooner determination of such term, be resisted by any person entitled to any reversion, expectant on the determination thereof.”^b

Act not to extend to Scotland or Ireland.

The above act does not extend to *Scotland*, or *Ireland*; ^c and was limited to commence on the first day of *Michaelmas* term 1832 ^d.

Stat. 2 & 3 W. IV. c. 100., for shortening the time required in claims of *modus decimandi*, &c.

By the statute 2 & 3 W. IV. c. 100., for shortening the time required in claims of *modus decimandi*, or exemption from or discharge of tithes, reciting that whereas the expence and inconvenience of suits instituted for the recovery of tithes, might and ought to be prevented, by shortening the time required for the valid establishment of claims of a *modus decimandi*, or exemption from or discharge of tithes; it is enacted, that “all prescriptions and claims of or for any *modus decimandi*, or of or to any exemption from or discharge of tithes, by composition real or otherwise, shall, in cases where the render of tithes in kind shall be hereafter demanded by our lord the king, his heirs or successors, or by any Duke of *Cornwall*, or by any *lay* person, (not being a corporation *sole*,) or by any body corporate of many,

What prescriptions, and claims of *modus decimandi*, or exemption from tithes, to be valid in law.

^a § 7.

^c § 9.

^b § 8.

^d § 10.

CHAP. I.

“ whether temporal or spiritual, be sustained, and be deemed good
 “ and valid in law, upon evidence shewing, in cases of claim of a
 “ *modus decimandi*, the payment or render of such *modus*, and in
 “ cases of claim to exemption or discharge, shewing the enjoyment
 “ of the land, without payment or render of tithes, money, or
 “ other matter in lieu thereof, for the full period of *thirty* years
 “ next before the time of such demand ; unless, in the case of claim
 “ of a *modus decimandi*, the actual payment or render of tithes in
 “ kind, or of money, or other thing differing in amount, quality, or
 “ quantity, from the *modus* claimed, or, in case of claim to exemption
 “ or discharge, the render or payment of tithes, or of money or
 “ other matter in lieu thereof, shall be shewn to have taken place
 “ at some time prior to such *thirty* years, or it shall be proved that
 “ such payment, or render of *modus*, was made, or enjoyment had,
 “ by some consent or agreement, expressly made or given for that
 “ purpose, by deed or writing : And if such proof in support of the
 “ claim shall be extended to the full period of *sixty* years next be-
 “ fore the time of such demand, in such cases the claim shall be
 “ deemed absolute and indefeasible, unless it shall be proved that
 “ such payment, or render of *modus*, was made, or enjoyment had,
 “ by some consent or agreement, expressly made or given for that
 “ purpose, by deed or writing. And where the render of tithes in kind
 “ shall be demanded by any archbishop, bishop, dean, prebendary,
 “ parson, vicar, master of hospital, or other corporation *sole*, whe-
 “ ther spiritual or temporal, then every such prescription or claim
 “ shall be valid and indefeasible, upon evidence shewing such pay-
 “ ment, or render of *modus*, made, or enjoyment had, as is herein-
 “ before mentioned, applicable to the nature of the claim, for and
 “ during the whole time that *two* persons in succession shall have
 “ held the office or benefice, in respect whereof such render of
 “ tithes in kind shall be claimed, and for not less than *three* years
 “ after the appointment and institution or induction of a third
 “ person thereto : Provided always, that if the whole time of the
 “ holding of such *two* persons shall be less than *sixty* years, then
 “ it shall be necessary to shew such payment, or render of *modus*,
 “ made, or enjoyment had, (as the case may be,) not only during
 “ the whole of such time, but also during such further number of
 “ years, either before or after such time, or partly before and
 “ partly after, as shall, with such time, be sufficient to make up the
 “ full period of *sixty* years, and also for and during the further
 “ period of *three* years after the appointment and institution or

In case of cor-
poration sole.

Provido.

CHAP. I. "induction of a third person to the same office or benefice; unless
 "it shall be proved that such payment, or render of *modus*, was
 "made, or enjoyment had, by some consent or agreement, expressly
 "made or given for that purpose, by deed or writing."^a

What compositions for tithes shall be considered valid.

That "every composition for tithes, which hath been made or
 "confirmed by the decree of any court of equity in *England*, in a
 "suit to which the ordinary, patron, and incumbent were parties,
 "and which hath not since been set aside, abandoned, or departed
 "from, shall be, and the same is thereby confirmed, and made valid
 "in law: And that no *modus*, exemption, or discharge, shall be
 "deemed to be within the provisions of this act, unless such *mo-*
 "*dus*, exemption, or discharge, shall be proved to have existed,
 "and been acted upon, at the time of, or within *one* year next
 "before the passing of this act."^b

The act not available, in any suit now commenced, &c.

"Provided always, that this act shall not be prejudicial or avail-
 "able, to or for any plaintiff or defendant, in any suit or action, rela-
 "tive to any of the matters before mentioned, now commenced, or
 "which may be hereafter commenced, during the present session
 "of parliament, or within *one* year from the end thereof."^c

To what cases this act shall not extend.

"Provided also, that this act shall not extend or be applicable
 "to any case where the tithes of any lands, tenements, or heredita-
 "ments, shall have been demised by deed, for any term of life, or
 "number of years, or where any composition for tithes shall have
 "been made by deed or writing, by the person or body corporate
 "entitled to such tithes, with the owner or occupier of the land, for
 "any such term or number of years, and such demise or composition
 "shall be subsisting at the time of the passing of this act, and where
 "any action or suit shall be instituted for the recovery or enfor-
 "cing the payment of tithes in kind, within *three* years next after
 "the expiration, surrender, or other determination of such demise
 "or composition."^d

^a § 1.

^b § 2.

^c § 3. After the passing of this act, a great number of suits were instituted for the recovery of *tithes*, under the apprehension, on the part of the plaintiffs, that they would be precluded thereby from recovering the tithes to which they claimed to be entitled, unless they prosecuted their claims within the period limited by the act: And it being con-

sidered, that it would be of great advantage to the country at large, that such actions or suits should not be further proceeded with, a bill was, during the last session of parliament, brought into the House of Commons, but not passed, for suspending the proceedings in such suits, until the end of the next session, or until parliament should otherwise direct.

^d § 4.

That “ where any lands or tenements shall have been, or shall be held or occupied by any rector, vicar, or other person entitled to the tithes thereof, or by any lessee of any such rector, vicar, or other person, or by any person compounding for tithes with any such rector, vicar, or other person, or by any tenant of any such rector, vicar, or other person, or of any such lessee or compounder, whereby the right to the tithes of such lands or tenements may have been or may be, during any time, in the occupier thereof, or in the person entitled to the rent thereof, the whole of every such time and times shall be excluded in the computation of the several periods of time thereinbefore mentioned.”^a

Time during which lands shall be held by persons entitled to the tithes thereof, to be excluded in the computation under this act.

And that “ the time during which any person, otherwise capable of resisting any claim to any of the matters before mentioned, shall have been or shall be an infant, idiot, *non compos mentis*, feme covert, or lay tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods thereinbefore mentioned, except only in cases where the right or claim is thereby declared to be absolute and indefeasible.”^b

Also the time during which any person, capable of resisting any claim, shall be an infant, &c.

And it is thereby further enacted, that “ in all actions and suits to be commenced after this act shall take effect, it shall be sufficient to allege that the *modus*, or exemption or discharge claimed, was actually exercised and enjoyed for such of the periods mentioned in this act, as may be applicable to the case; and if the other party shall intend to rely on any *proviso*, exception, incapacity, disability, contract, agreement, deed, or writing therein mentioned, or any other matter of fact, or of law, not inconsistent with the simple fact of the exercise and enjoyment of the matter claimed, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence, on any general traverse or denial of the matter claimed.”^c

What it shall be sufficient to allege, in actions commenced under this act.

That “ in the several cases mentioned in and provided for by this act, no presumption shall be allowed or made, in favour or support of any claim, upon proof of the exercise or enjoyment of the

No presumption allowed, in support of any claim, for any

^a § 5.

^c § 7.

^b § 6.

less period than mentioned in the act.	"right or matter claimed, for any less period of time or number of years than for such period or number mentioned in this act as may be applicable to the case, and to the nature of the claim." ^a
Act to extend to England only.	"Provided also, that this act shall not extend to <i>Scotland</i> , or <i>Ireland</i> ." ^b

Limitation of personal actions.

Having thus stated the law, as it now stands, with regard to the limitation of actions, entries, and distresses, relating to *real* property; and, as connected therewith, the provisions of the statutes 2 & 3 W. IV. c. 71, for shortening the time of *prescription* in certain cases, and 2 & 3 W. IV. c. 100, for shortening the time required in claims of *modus decimandi*, or exemption from or discharge of tithes, it will next be proper to take a view of the alterations which have been made in the law respecting the limitation of *personal* actions; and to shew what evidence is required of a new or continuing contract, and to prove that the action was commenced in due time, so as to prevent the operation of the statutes of limitations.

By stat. 21 Jac. I. c. 16. § 3.

By the statute 21 Jac. I. c. 16. § 3. it is enacted, that "all actions of trespass *quare clausum fregit*, &c., *detinue*, *trover*, and *replevin*, for taking away goods and cattle; all actions of *account*, and upon the *case*, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants; all actions of *debt*, grounded upon any lending or contract without specialty, or for arrearages of rent; and all actions of *assault*, *menace*, *battery*, *wounding*, and *imprisonment*, shall be commenced and sued within the times hereinafter expressed, and not after; that is to say, the said actions upon the *case*, (other than for *slander*,) *account*, *trespass quare clausum fregit*, &c., *debt*, *detinue*, and *replevin*, within six years next after the cause of such actions or suit, and not after; actions of *assault*, and *battery*, *wounding*, and *imprisonment*, within four years; and actions upon the *case* for words, within two years next after the words spoken, and not after."

Savings for infants, &c.

To what actions confined.

This statute, which contained the usual savings for infants, *femes covert*, and persons *non compos mentis*, imprisoned, or beyond the seas, was confined to the particular actions enumerated therein, and did not extend to actions of *covenant*, or *debt* on *specialty*, or

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other matter of a higher nature; but only to actions of *debt* upon a lending or contract without specialty, or for arrearages of rent reserved on parol leases^a, &c. A *scire facias* also, being founded on matter of record, was not within the statute^a. But now, by the late act for the further amendment of the law, &c. (3 & 4 W. IV. c. 42^b.) "all actions of *debt* for rent upon an indenture of demise, all actions of *covenant* or *debt* upon any bond or other specialty, and all actions of *debt* or *scire facias* upon any recognizance, and also all actions of *debt* upon any *award*, where the submission is not by specialty, or for any *fine* due in respect of any copyhold estates, or for an *escape*, or for money levied on any *feri facias*, and all actions for *penalties*, damages, or sums of money, given to the party *grieved*, by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of parliament, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of *debt* for rent upon an indenture of demise, or *covenant* or *debt* upon any bond or other specialty, actions of *debt* or *scire facias* upon recognizance, within *ten* years after the end of the then present session, or within *twenty* years after the cause of such actions or suits, but not after; the said actions by the party *grieved*, *one* year after the end of that present session, or within *two* years after the cause of such actions or suits, but not after; and the said other actions, within *three* years after the end of that present session, or within *six* years after the cause of such actions or suits, but not after: Provided, that nothing therein contained shall extend to any action given by any statute, where the time for bringing such action is, or shall be, by any statute specially limited."

Limitation of actions of debt on specialties, &c. by stat. 3 & 4 W. IV. c. 42. § 3.

And it is thereby further enacted, that "if any person or persons, that is or are or shall be entitled to any such action or suit, or to such *scire facias*, is or are, or shall be at the time of any such cause of action accrued, within the age of *twenty-one* years, *feme covert*, *non compos mentis*, or beyond the seas, then such person or persons shall be at liberty to bring the same actions, so as they commence the same within such times, after their coming to or

Remedy for infants, femes, covert, &c.

^a Tidd *Prac.* 9 Ed. 15, 16. and see *v. Harridge*, 2 Wms. Saund. 5 Ed. 66.
Freeman v. Stacy, Hut. 109. *Jones v.* ^b § 3. and see 3 Rep. C. L. Com. 16.
Pope, 1 Wms. Saund. 5 Ed. 38. *Hodsdon* 73.

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Absence of defendants beyond the seas provided for.

“ being of full age, discover, of sound memory, or returned from
 “ beyond the seas, as other persons, having no such impediment,
 “ should, according to the provisions of that act, have done ^a: And
 “ that if any person or persons, against whom there shall be any
 “ such cause of action, is or are, or shall be, at the time of such
 “ cause of action accrued, beyond the seas, then the person or per-
 “ sons entitled to any such cause of action, shall be at liberty to
 “ bring the same against such person or persons, within such
 “ times as are before limited, after the return of such person or
 “ persons from beyond the seas.” ^a

Proviso in case of acknowledgment in writing, or by part payment, &c.

“ Provided always, that if any acknowledgment shall have been
 “ made, either by writing, signed by the party, liable by virtue of
 “ such indenture, specialty, or recognizance, or his agent, or by
 “ part payment or part satisfaction, on account of any principal or
 “ interest being then due thereon, it shall and may be lawful for
 “ the person or persons entitled to such actions, to bring his or
 “ their action for the money remaining unpaid, and so acknowledged
 “ to be due, within *twenty* years after such acknowledgment by writ-
 “ ing, or part payment or part satisfaction, as aforesaid; or in case
 “ the person or persons entitled to such action shall, at the time of
 “ such acknowledgment, be under such disability as aforesaid, or
 “ the party making such acknowledgment be, at the time of mak-
 “ ing the same, beyond the seas, then within *twenty* years after such
 “ disability shall have ceased as aforesaid, or the party shall have
 “ returned from beyond seas, as the case may be; and the plain-
 “ tiff or plaintiffs in any such action *or* ^b any indenture, specialty or
 “ recognizance, may, by way of replication, state such acknow-
 “ ledgment, and that such action was brought within the time
 “ aforesaid, in answer to a plea of this statute.” ^c

Limitation of actions, after judgment or outlawry reversed.

“ Nevertheless, if, in any of the said actions, judgment be
 “ given for the plaintiff, and the same be reversed by error, or a
 “ verdict pass for the plaintiff, and, upon matter alleged in arrest
 “ of judgment, the judgment be given against the plaintiff, that
 “ he take nothing by his plaint, writ, or bill, or if, in any of the said
 “ actions, the defendant shall be outlawed, and shall after reverse
 “ the outlawry, that in all such cases, the party plaintiff, his exe-
 “ cutors or administrators, as the case shall require, may com-

^a § 4. and see 3 Rep. C. L. Com. 16. of *on*.

73.

^c § 5. and see 3 Rep. C. L. Com. 16.

^b *Sic*, in printed copy of act, instead 73.

"mence a new action or suit, from time to time, within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after."^a

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The statute 21 Jac. I. c. 16. was extended to persons in *Scotland*; so that if a plaintiff or defendant resided there, he must have sued, or been sued, within the time limited by the statute.^b And now, by the late act for the further amendment of the law^c, &c. "no part of the united kingdom of *Great Britain* and *Ireland*, nor the islands of *Man*, *Guernsey*, *Jersey*, *Alderney*, and *Sark*, nor any islands adjacent to any of them, being part of the dominions of his Majesty, shall be deemed to be beyond the seas, within the meaning of that act, or of the 21 Jac. I. c. 16."

Stat. 21 Jac. I. c. 16. extended to *Scotland*.

No part of the united kingdom, &c. now deemed beyond the seas.

In order to prevent the operation of the statutes of limitations, it is in general necessary for the plaintiff to prove that the action was commenced in due time after the cause of it originally accrued, or was subsequently admitted to continue. Two questions, therefore, frequently occur on these statutes; 1st, what shall be deemed sufficient evidence of a new or continuing contract, so as to prevent the operation of them; and, secondly, at what time the action may be said to have been commenced.

Means of preventing operation of statutes of limitations.

It was formerly holden, that a bare acknowledgment of a debt by the defendant, and that of the slightest nature, within six years before the commencement of the action, was sufficient to prevent the operation of the statute of limitations^d: but, from more recent cases^e, it seems that, in order to take a case out of the statute, it is necessary to prove an actual promise by the defendant, or an absolute and unqualified acknowledgment, from which a promise may be inferred, to pay the debt, as stated in the declaration; and if the promise was conditional, that the condition was performed before the bringing of the action.

Acknowledgment or promise when sufficient, or not, for that purpose.

^a § 6. and see 3 Rep. C. L. Com. 16. 73.

^b Tidd *Prac.* 9 Ed. 16. and see King v. Walker, 1 Blac. Rep. 286. Du Belloix v. Lord Waterpark, 1 Dowl. & R. 16.

^c 3 & 4 W. IV. c. 42. § 7.

^d Tidd *Prac.* 9 Ed. 22, &c.

^e A'Court v. Cross, 3 Bing. 329. 331. Tullock v. Dunn, Ry. & M. 416. per Abbott, Ch. J. M'Culloch v. Dawes, 9 Dowl. & R. 40. Ayton v. Bolt, 12

Moore, 305. 4 Bing. 105. S. C. Tanner v. Smart, 6 Barn. & C. 603. 9 Dowl. & R. 549. S. C. Brydges v. Plumptre, 9 Dowl. & R. 746. Pierce v. Brewster, 12 Moore, 515. Gould v. Shirley, 2 Moore & P. 581. Haydon (or Eden) v. Williams, 4 Moore & P. 811. 7 Bing. 163. S. C. Lang v. Mackenzie, 4 Car. & P. 463. per Tindal, Ch. J. Bealey v. Greenslade, 1 Price N. R. 144. 2 Cramp. & J. 61. S. C.

By stat. 9. Geo.
IV. c. 14.

Before the making of the statute 9 Geo. IV. c. 14. (Ld. *Tenterden's* act,) various questions had arisen, in actions founded on simple contract, as to the proof and effect of acknowledgments and promises offered in evidence, for the purpose of taking cases out of the operation of the enactments of the statute 21 *Jac.* I. c. 16. § 3. *; and it being deemed expedient to prevent such questions, and to make provision for giving effect to the said enactments, and to the intention thereof, it was enacted by the above statute, (9 Geo. IV. c.

In actions of
debt, or upon the
case, no acknow-
ledgment shall
be deemed suffi-
cient, unless it
be in writing, or
by part pay-
ment.

14.) that “ in actions of *debt*, or upon the *case*, grounded upon any “ simple contract, no acknowledgment or promise, by *words* only, “ shall be deemed sufficient evidence of a new or continuing contract, “ whereby to take any case out of the operation of the said enact- “ ments, or either of them, or to deprive any party of the benefit “ thereof, unless such acknowledgment or promise shall be made “ or contained by or in some *writing*, to be signed by the party

Case of joint
contractors.

“ chargeable thereby; and that where there shall be two or more “ joint contractors, or executors or administrators of any contrac- “ tor, no such joint contractor, executor or administrator, shall “ lose the benefit of the said enactments, or either of them, so as “ to be chargeable in respect or by reason only of any written ac- “ knowldgment or promise, made and signed by any other or

Effect of pay-
ment of principal
or interest.

“ others of them : Provided always, that nothing therein contained “ shall alter or take away, or lessen the effect of any payment of any

Plaintiff, though
barred as to one
or more joint
contractors, may
proceed against
others.

“ principal or interest, made by any person whatsoever : Provided “ also, that in actions to be commenced against two or more such “ joint contractors, or executors or administrators, if it shall ap- “ pear at the trial, or otherwise, that the plaintiff, though barred “ by either of the therein recited acts, or that act, as to one or “ more of such joint contractors, or executors or administrators, “ shall nevertheless be entitled to recover against any other or “ others of the defendants, by virtue of a new acknowledgment or “ promise, or otherwise, judgment may be given, and costs allowed “ for the plaintiff, as to such defendant or defendants against “ whom he shall recover, and for the other defendant or defend- “ ants against the plaintiff.”

Pleas in abate-
ment, for non-
joinder.

And it is thereby further enacted, that “ if any defendant or “ defendants, in any action on any simple contract, shall plead any “ matter in abatement, to the effect that any other person or “ persons ought to be jointly sued, and issue be joined on such

* *Ante*, 42.

§ 1.

“plea, and it shall appear at the trial that the action could not, by reason of the said recited acts, or this act, or of either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same.”^a

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In order to prove the payment of interest, or a part of the principal, an indorsement made by the obligee upon the bond within *twenty* years, was formerly allowed to be evidence^b; but an indorsement made after the presumption had taken place, was not admissible^c: And now, by the statute 9 Geo. IV. c. 14.^c “no indorsement or *memorandum* of any payment, written or made after the time appointed for that act to take effect, upon any promissory note, bill of exchange, or other writing, by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes.” And, by another clause of the same statute^d, the said recited acts, and that act, shall be deemed and taken to apply to the case of any debt on simple contract, alleged by way of *set off*, on the part of any defendant, either by plea, notice, or otherwise.”

Indorsement of payment on promissory notes, &c. when not admissible in evidence.

Simple contract debts, alleged by way of set off.

This statute was limited to commence and take effect on the first day of *January* 1829^e: And it was holden, that the *first* section of the statute had a retrospective operation, and applied to *parol* acknowledgements made before its provisions came into effect, although such acknowledgments were made, and the action brought thereon, before the commencement of the act^f.

Commencement and operation of act.

Since the making of this statute, it was determined, in a case where the defendant, by letter, had admitted a balance to be due,

Decisions thereon.

^a § 2.^b Tidd *Prac.* 9 Ed. 19.^c § 3. ^d § 4.^e § 10.

^f *Hilliard v. Lenard*, 1 Moody & M. 237. per *Ld. Tenterden*, Ch. J. *Ansell v. Ansell*, 3 Car. & P. 563. 1 Moody & M. 299. S. C. per *Ld. Tenterden*, Ch. J. *Towler v. Chatterton*, 3 Moore & P. 619. 6 Bing. 258. Wilk. Stat. Lim. 146. S. C. and see *Amner v. Cattell*, 5 Bing. 206. 2 Moore & P. 387. S. C. 3 Car. & P. 564. (b.) 1

Moody & M. 299, 300. *in notis*. Wilk. Stat. Lim. 143, &c. S. C. *Lockley v. Maund*, 2 Leg. Obs. 285, 6. in Chan. But the *sixth* section of the above statute, as to representations of character, not having a retrospective operation, it has been holden, that an action commenced before the first of *January* 1829, but tried after that day, on such a representation, made by *parol* before the passing of the statute, is maintainable. *Fellowes v. Williamson*, 1 Moody & M. 306. per *Ld. Tenterden*, Ch. J.

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^a Dickenson v. Hatfield, 5 Car. & P. 46. 2 Moody & M. 141. S. C.

^b Fearn v. Lewis, 4 Moore & P. 1. 6 Bing. 349. 4 Car. & P. 173. S. C. and see Cory v. Bretton, 4 Car. & P. 462. *per Tindal*, Ch. J. Brigstocke v. Smith, 1 Crompt. & M. 463.; but see Evans v. Heathcote, 1 Leg. Obs. 398. K. B.

^c Kennett v. Milbank, 8 Bing. 38. 1 Moore & S. 102. S. C.

^d Willis v. Newham, 3 Younge & J. 518.

^e Haydon (or Eden) v. Williams, 4 Moore & P. 811. 7 Bing. 163. S. C.

^f Smith v. Forty, 4 Car. & P. 126. *per Vaughan*, B.

The payment, within *six* years, of *interest* due upon a note beyond that period, where the note remains in the hands of the payee, is sufficient to take the case out of the statute of limitations^a; and an acknowledgment, or payment of interest, by one of several drawers of a joint and several promissory note, will take the case out of the statute, as against any of the other drawers, in a separate action on the note against him^b: And the statute 9 Geo. IV. c. 14, § 1, has not altered the law in this respect^c. So, in a *joint* action against several drawers of a promissory note, it was formerly holden, that an acknowledgment within *six* years, by one of them, would revive the debt against another, although the latter had made no acknowledgment, and only signed the note as a surety^d. And where *A.* and *B.* had given a joint promissory note for £600 to *C.*; an account, in which *B.*, as between himself and *C.*, gave credit for interest upon a sum of £600, was deemed evidence, in an action by *C.* against *A.* and *B.*, to take the case out of the statute of limitations^e.

In action on promissory note.

When there are several *items* in an account, some of which accrued within the last *six* years, and others beyond that period, the statute of limitations will be a bar to the recovery of the latter *items*; and the former will not take the case out of the statute of limitations, unless the account is mutual, or the *items* are so connected together, as necessarily to form the subject of one action: Therefore, where the plaintiff, a proctor, sued the defendant for the amount of his bill, which was principally for work done in prosecuting an appeal to judgment, more than *six* years before the commencement of the action; but after the judgment, a communication had been made by the adverse party to the plaintiff, as

When there are mutual accounts.

^a *Bealey v. Greenslade*, 1 Price, N.R. 144. 2 Crompt. & J. 61. 2 Tyr. Rep. 121. S. C.

^b *Whitcomb v. Whiting*, Doug. 652, 3. *Burleigh v. Stott*, 8 Barn. & C. 36. 2 Man. & R. 93. S. C. *Chippendale v. Thurston*, 4 Car. & P. 98. 1 Moody & M. 411. S. C. *per Parke, J.* *Pease v. Hirst*, 10 Barn. & C. 122. 5 Man. & R. 98. S. C. *Wyatt v. Hodson*, 8 Bing. 309. and see *Fenton v. White*, 1 Leg. Obs. 333. *per Garrow, B.*

^c *Chippendale v. Thurston*, 4 Car. &

P. 98. 1 Moody & M. 411. S. C. *per Parke, J.* In this case, the interest was one of the *items* in an account, of which the party had paid the balance; which was ruled to be a sufficient *payment* of interest: but see *Willis v. Newham*, 3 Younge & J. 518.

^d *Tidd Prac.* 9 Ed. 23.; but the law in this respect is now altered, by the statute 9 Geo. IV. c. 14. *Ante*, 46.

^e *Manderston v. Robertson*, 4 Man. & R. 440. and see *id.* 447. (a.)

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Means of commencing actions, formerly necessary, to take case out of the statute.

In order to shew that an action was commenced in due time, so as to take the case out of the statute of limitations, it was formerly necessary to sue out an *original writ*, in the King's Bench or Common Pleas, which was the only mode of proceeding against *peers* of the realm, *corporations*, or *hundredors* ^c; or to sue out a bill of *Middlesex* or *latitat*, in the King's Bench, or *capias quare clausum fregit* in the Common Pleas, which was as effectual for this purpose as an original writ ^d; and suing out a *testatum capias ad respondendum* was a good commencement of an action by *original* ^d. In the Exchequer, it was necessary to sue out a *venire facias*, *subpoena*, or *quo minus capias ad respondendum* ^e. In actions against members of the House of Commons, an *original writ* must have been sued out at common law, or a *bill* filed since the statute 12 & 13 W. III. c. 3. § 2 ^f. In actions at the suit of *attornies*, it was usual to sue out an attachment of *privilege*, in the King's Bench ^g, or Common Pleas ^h; or *venire facias*, or *capias* of privilege, in the Exchequer ⁱ; and a *bill* must have been filed against *attornies* ^k, or *prisoners* in actual custody of the marshal ^l. But now, by the Uniformity of Process act ^m, the above means of commencing personal actions in the superior courts of law at *Westminster*, as well as the distinctions between proceedings by *original writ* and by

Abolished by stat. 2 W. IV. c. 39.

^a *Rothery v. Munnings*, 1 Barn. & Ad. 15.

^b *Tidd Prac.* 9 Ed. 24. And for cases of promises or acknowledgments, before Lord *Tenterden's* act, and when they were sufficient, or not, to take the case out of the statute of limitations, see *id.* 22, &c. 3 Chit. Blac. Com. 306. (a.) & Wilk. Stat. Lim. Chap. IV. V. VI. VII.

^c *Tidd Prac.* 9 Ed. 102.

^d *Id.* 27.

^e *Id.* 155.

^f *Id.* 116, &c.

^g *Id.* 319.

^h *Id.* 320.

ⁱ *Id.* 92. 321.

^k *Id.* 92. 321. 323. 325.

^l *Id.* 91. 353, &c.

^m 2 W. IV. c. 39.

bill, are abolished; and writs of *summons*, *capias*, and *detainer*, are substituted in lieu thereof, and declared to be the only writs for the commencement of personal actions, in any of the courts aforesaid, in the cases to which such writs are applicable^a. The writs of *summons*, and of *capias*, however, may be continued by *alias* and *pluries*, as the case may require, if any defendant therein named may not have been arrested thereon, or served therewith^b: But it is provided, that "no first writ shall be available to prevent the operation of any statute, whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon or served therewith, or proceedings to or toward outlawry shall be had thereupon; or unless such writ, and every writ, (if any,) issued in continuation of a preceding writ, shall be returned *non est inventus*, and entered of record^c, within one calendar month next after the expiration thereof, including the day of such expiration; and unless every writ, issued in continuation of a preceding writ, shall be issued within one such calendar month after the expiration of the preceding writ, and shall contain a *memorandum* indorsed thereon, or subscribed thereto, specifying the day of the date of the first writ; and^d return to be made, in bailable process, by the sheriff, or other officer to whom the writ shall be directed, or his successor in office; and in process not bailable, by the plaintiff or his attorney suing out the same, as the case may be."

This statute, however, does not extend to any cause removed into either of the superior courts, by writ of *pone*, *certiorari*, *recordari facias loquelam*, *habeas corpus*, or otherwise^e: and therefore, if a plaint be levied in an inferior court in due time, and then it be removed into the King's Bench by *habeas corpus*, and the plaintiff declare there *de novo*, and the defendant plead the statute of limitations, the plaintiff may reply, and shew the plaint in the inferior court, and that will be sufficient to avoid the statute^f.

Writs substituted in lieu thereof.

Writs of *summons* and *capias* may be continued by *alias* and *pluries*.

What must be done thereon, to prevent operation of statute.

Statute does not extend to inferior courts.

^a § 21.

^b § 10.

^c For the form of an entry of a writ of *summons*, with the return of *non est inventus* by the plaintiff or his attorney, and award of *alias*, to save the statute of limitations, see Append. to Chap. I. § 1. and for the entry of a writ of *capias*,

with the sheriff's return of *non est inventus*, and award of *alias capias*, *id.* § 2.

^d Sic, in printed copy of act, instead of *such*, as in the bill.

^e Stat. 2 W. IV. c. 39. § 19.

^f Tidd *Prac.* 9 Ed. 27, 8.

Tender of debt,
&c.

Previously to the commencement of an action, it is frequently advisable, as a precautionary measure^a, to make a legal tender of the *debt* admitted to be due, or of *damages*, when allowed to be pleaded, as in the case of a negligent or involuntary trespass, or in actions against justices, &c.

In money, or
bank notes, &c.

Before the statute 3 & 4 W. IV. c. 98., the tender should regularly have been made in lawful money of *England*; which is of two sorts, viz. *English* money, coined by the King's authority, or *foreign* coin, made current by his royal proclamation within the realm^b; the latter was considered as a good tender^c: and though bank notes were not made a legal tender, by the statute 37 Geo. III. c. 45^d, yet a tender in bank of *England*, or country bank notes, was good, unless specially objected to on that account at the time^e. The same doctrine was applied to a draft on a banker^f: and in one case it was holden, that a tender in a *Liverpool* bank bill of exchange was good, if not specially objected to^g; but, in a subsequent case, the tender of a *Bristol* bank bill was holden not to be good, although the party made no objection as to the form of the tender^h. And now, by the statute 3 & 4 W. IV. c. 98. § 6, it is enacted, that "from and after the 1st day of *August* 1834, unless and until parliament shall otherwise direct, a tender "of a note or notes of the Governor and Company of the Bank "of *England*, expressed to be payable to bearer on demand, shall "be a legal tender, to the amount expressed in such note or notes,

By stat. 3 & 4
W. IV. c. 98.

^a This is one of the precautionary measures recommended to be adopted by Mr. *Chitty*, in his excellent treatise, now publishing, on the Practice of the Law, Chap. V. p. 506.; and see his note on the subject of tender, 3 Chit. Blac. Com. 303.

^b Co. Lit. 207.

^c *Wade's* case, 5 Co. 114. b.

^d *Grigby v. Oakes*, 2 Bos. & P. 526. and see stat. 36 Geo. III. c. 68. § 11., by which gold coin was declared to be the only legal tender.

^e *Wright v. Reed*, 3 Durnf. & E. 554. *Brown v. Saul*, 4 Esp. Rep. 267. per *Ld. Ellenborough*, Ch. J. *Saunders v. Graham*, Gow, 121. per *Dallas*, Ch. J.

Polglass v. Oliver, 2 Crompt. & J. 15. 2 Tyr. Rep. 89. S. C.

^f Per *Buller*, J. in *Wilby v. Warren*, Sit. Mid. after M. T. 28 Geo. III. K. B. Tidd Prac. 9 Ed. 187. (m.)

^g *Lockyer v. Jones*, Peake Cas. Ni. Pri. 180. n.

^h *Mills v. Safford*, *id. ib.* and see *Polglass v. Oliver*, 2 Crompt. & J. 15. 2 Tyr. Rep. 89. S. C. And for the doctrine of tender in general, and in what cases it is, or is not allowed, at common law, or by statute; at what time, by and to whom, and in what manner it should be made; and when and how it should be pleaded, &c., see the 1st Supplement to Tidd Prac. 9 Ed. p. 10, &c.

"and shall be taken to be valid, as a tender to such amount, for
"all sums above *five* pounds, on all occasions on which any tender
"of money may be legally made, so long as the Bank of *England*
"shall continue to pay on demand their said notes in legal coin.
"Provided always, that no such note or notes shall be deemed a
"legal tender of payment, by the Governor and Company of the
"Bank of *England*, or any branch bank of the said Governor and
"Company: but the said Governor and Company are not to be-
"come liable, or be required to pay and satisfy, at any branch
"bank of the said Governor and Company, any note or notes of
"the said Governor and Company, not made specially payable at
"such branch bank; but the said Governor and Company shall
"be liable to pay and satisfy, at the bank of *England* in *London*,
"all notes of the said Governor and Company, or of any branch
"thereof."

CHAP. II.

Of the OFFICERS on the PLEA side of the Court of EXCHEQUER, and their DUTIES; and of HOLIDAYS, and FEES, &c.

Principal officers
of Exchequer of
Pleas, before
stat. 2 & 3 W.
IV. c. 110.

BEFORE the statute 2 & 3 W. IV. c. 110, the principal officers of the court of Exchequer of Pleas, were the clerk of the Pleas, and his deputy, who was called the *Master*. The clerk of the Pleas was appointed by the chancellor of the Exchequer for life, or *quamdiu se bene gesserit*, and the deputy, or master, by the clerk of the Pleas. The business of the master was to take minutes of what was done in court, draw up rules, make reports on matters referred to him, tax bills of costs, allow bails, and sign process, and judgments^a, &c. The clerk of the Pleas was also, by virtue of his office, clerk of the *Errors* in the Exchequer Chamber; and his duties in that character were, to allow writs of error, certify transcripts, attend the court of Exchequer Chamber when sitting, and draw up rules thereon^b.

By that statute.

By the above statute, for the better regulation of the duties to be performed by the officers on the plea or common law side of the court of Exchequer, after reciting that an act had been passed in the first year of the reign of his present Majesty, intituled 'An act for the more effectual administration of justice in *England* and *Wales*;^b and, by the said act, certain changes were made on the plea or common law side of the court of Exchequer; and that *William Stewart Rose* Esquire then was clerk of the Pleas in the said court, and was lawfully entitled to execute the said office by himself, or his sufficient deputy, during the term of his natural life; and *Thomas Dax* Esquire, commonly called the *Master*, then was deputy clerk of the Pleas, and *Stephen Richards*, *Kenrick Collett*, *Edmund Walker*, and *George Chilton* Esquires, were the four

^a Tidd *Prac.* 9 Ed. 58. And for an account of the present duties of the officers of the court of Exchequer of Pleas, and of the business done in that court, see Dax *Excheq.* 2 Ed. 4, &c. 10, &c.
^b 11 Geo. IV. & 1 W. IV. c. 70. § 10. 14.

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sworn clerks in the said court; and the said *Thomas Daz*, *Stephen Richards*, *Kenrick Collett*, *Edmund Walker*, and *George Chilton*, were the *five* principal acting officers of the said court; and that the business, in the offices on the plea or common law side of the said court, had greatly increased, and the same, since the passing of the said act, had been conducted and performed by the said deputy clerk of the pleas, and the said four sworn clerks, but without any regulation as to the respective duties to be performed by each; and many of the duties of the master had from necessity been performed by the sworn clerks, but without any obligation upon them to perform such duties; and that it was expedient to apportion such business among the said officers, and to fix and determine the duties to be performed by them respectively; it is enacted, that "from and after the commencement of that act, there shall continue to be *five* principal officers on the plea side of the said court, exclusive of the said *William Stewart Rose* Esquire, the said clerk of the pleas, (whose office, when a vacancy shall occur by his demise or otherwise, is not again to be filled up,^a) and no more; and that the said *Thomas Daz*, *Stephen Richards*, *Kenrick Collett*, *Edmund Walker*, and *George Chilton* Esquires, who had so conducted the business on the plea side of the said court, and their successors, shall, from and after the passing of this act, perform the same as follows; that is to say, the said *Thomas Daz*, *Kenrick Collett*, and *Edmund Walker*, shall perform the duties of *master* and *prothonotary*; the said *Stephen Richards*, the duties of *clerk of the rules*, and the said *George Chilton* the duties of *filazer* of the said court; and the said officers shall be styled and designated accordingly: and if any doubt or difference shall at any time arise, respecting the duties to be performed by the said respective officers, the same shall be settled and determined by the Lord Chief Baron, and the other barons of the said court, for the time being."^b

There shall be *five* principal officers on the plea side of the court, exclusive of the clerk of the pleas.

Their duties.

That "the office of clerk of the *Errors*, now filled and executed by the said *Thomas Daz*, shall continue to be filled and executed by him, as long as he shall be a master or prothonotary of the said court, and no longer; and the same shall always hereafter be filled by the person who shall be the *senior* master or prothonotary of the court for the time being."^c And that "the said officers, and their assistants and clerks, shall give their at-

Clerk of the errors.

Attendance, and hours of business, to be as di-

^a § 8.

^b § 1.

^c § 4.

rected by the
court.

"tendance in court or elsewhere, and shall conduct the business
"in their several departments, at such hours, and in every respect
"in such manner, as the said Lord Chief Baron, and other barons
"of the said court, shall from time to time order and direct."^a

Holidays men-
tioned in stat. 5
& 6 Edw. VI.
c. 3. abolished.

By the statute 5 & 6 Edw. VI. c. 3. certain days therein mentioned, consisting principally of *Saints'* days, several of which happened in term time, were required to be kept holidays^b: But, by the late act for the further amendment of the law^c, &c., reciting that the observance of holidays, in the superior courts of common law, during term time, and in the offices belonging to the same, on the several days on which holidays are now kept, is very inconvenient, and tends to delay in the administration of justice; it is enacted, that "none of the several days mentioned in the
"said statute, shall be observed or kept in the said courts, or in
"the several offices belonging thereto, except *Sundays*, the day of
"the nativity of our Lord, and the *three* following days, and
"*Monday and Tuesday* in *Easter week*."

Fees of officers
of superior
courts.

In treating of the *fees* of officers of the superior courts, it has been shewn, in the first *Supplement* to the Practice^d, that by an act passed in the 11th year of the reign of King *George* the Fourth, and 1st year of the reign of his present Majesty, intituled, '*An act for regulating the receipt and future appropriation of fees and emoluments, receivable by officers of the superior courts of common law*,'^e persons holding certain offices and employments are required to render to the commissioners, to be appointed by virtue of the said act, an account of the lawful fees and emoluments which have become due, in respect of such offices and employments, during the periods therein specified; and such commissioners are thereby authorized to inquire into and examine, as well the legal-

^a § 6.

^b For an account of the different holidays, and when they were commanded or allowed to be kept, in term time or vacation, with the remedies for not opening the offices on other days, or refusing to do business in office hours, without the

payment of *extra fees*, see *Tidd Prac.* 9 Ed. 55, &c.

^c 3 & 4 W. IV. c. 42. § 43.

^d 1 Sup. to *Tidd Prac.* 9 Ed. 40, &c.

^e Stat. 11 Geo. IV. & 1 W. IV. c. 58, and see the preamble to stat. 1 & 2 W. IV. c. 35.

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ity as the amount of the fees and emoluments contained in such accounts, and are directed to ascertain the gross and net annual value, according to an average of *ten* years, of the lawful fees and emoluments of such offices and employments as aforesaid: But it being found difficult, in many cases, to find any certain rule by which the legality of such fees and emoluments could be strictly ascertained, and it being expedient that the compensation directed by the said acts should be made upon equitable principles, it is enacted and declared by the statute 1 & 2 W. IV. c. 35.^a, that “all fees and emoluments received and enjoyed in respect of the “said offices or employments, which the said commissioners shall “deem to be reasonable, and which shall have been received for “*fifty* years before the 24th day of *May* 1831, or which shall “have been uniformly received, in respect of any matter or business which shall have first arisen within the said period of *fifty* “years, by authority of parliament, or other legal authority, shall “be deemed and taken to be legal fees and emoluments, within “the true intent and meaning of the said act.”

What shall be deemed legal fees, by stat. 1 & 2 W. IV. c. 35.

And it is thereby further enacted, that “if such commissioners “shall entertain any doubt as to the propriety or reasonableness “of any such fees, or any matter connected therewith, it shall be “lawful for them to consult thereon the court or judge by whose “officer the same may have been received, or any one or more of “the judges of such court; and such court and judges shall, and “are thereby required to give their or his advice and opinion, as “early as the same can be reasonably done; and that the advice “so given, and the question to which it is in answer, shall be in “writing.”^b And that “the persons holding the offices or situations “named in the schedule to that act annexed^c, shall be deemed “and taken to be within the true intent and meaning of the said “act, and within the authority and jurisdiction of the said com-

If commissioners are in doubt as to the legality of any fees, they may consult the court or judges thereon.

Persons named in schedule, to be deemed within the meaning of this act.

^a § 1.

^b § 2.

^c These persons are, the master or secondary of the court of King's Bench at *Westminster*; signer of the writs in the same court; chaplain of the King's Bench prison; chief usher of the said court; under ushers and criers of the same court; keeper of *Westminster* hall;

warden of the *Fleet* prison; officers of the revenue side of the courts of Exchequer at *Westminster*; officers acting under commissioners of assize at *Nisi Prius*, *oyer* and *terminer*, and general gaol delivery, in *England*; who held such office on the *twenty-fourth* day of *May* in the year of our Lord 1830.

CHAP. II. "missioners, who shall inquire into and report upon the value of
"the said offices or situations."^a

Persons holding
offices for years,
or during plea-
sure, in the
courts of great
session of *Chester*
or *Wales*, to
receive com-
pensation for
fees.

By the late act for the more effectual administration of justice in *England* and *Wales*^b, persons holding *freehold* offices were alone empowered to receive compensation from commissioners to be appointed by virtue of that act; but it being considered that the holders of such offices for years, or during pleasure, were in justice entitled thereto, it was enacted, by the statute 1 & 2 W. IV. c. 35.^c, that "all persons who before the *first day of January* 1828, "held offices or situations in any of the courts of great session in "the county of *Chester*, or principality of *Wales*, by virtue of any "appointment theretofore lawfully made, for term of years, or "during pleasure, shall be deemed and taken to be within the true "intent and meaning of the said act as above mentioned, and "within the jurisdiction and authority of the commissioners appointed by virtue of the same act."

^a Stat. 1 & 2 W. IV. c. 35. § 3. § 25. 1 Sup. to Tidd *Prac.* 9 Ed. 49.

^b 11 Geo. IV. & 1 W. IV. c. 70. ^c § 4.

CHAP. IV, V, VI, IX.*

Of the MEANS of COMMENCING PERSONAL ACTIONS in the Superior Courts of Law at WESTMINSTER ; and of the PROCESS therein, by WRIT of SUMMONS and DISTRINGAS, and the Service and Execution of such Process.

BEFORE the statute 2 W. IV. c. 39. the means of commencing *personal* actions in the court of King's Bench, conformable to its jurisdiction, were, *first*, by *original* writ, which was three-fold: 1. against common persons^a; 2. against peers of the realm, and members of the House of Commons^b; 3. against corporations^c, and hundredors^d: *secondly*, by *bill* of *Middlesex*, or *latitat*^e: *thirdly*, by *attachment* of privilege, at the suit of attornies, and officers of the court^f; and *fourthly*, by *bill*; which was of three kinds: 1. against members of the House of Commons^g; 2. against attornies, and officers of the court^h; 3. against prisoners in custody of the sheriffⁱ, &c., or marshal of the King's Bench prison^k.

Means formerly used for commencing personal actions, in K. B.

In the Common Pleas, the means of commencing personal actions were *first*, by *original* writ, issuing out of Chancery; which was either a *special* original, adapted to the nature of the action, or a *common* original, in trespass *quare clausum fregit*^l. The former, though it might have been had in any case, was only ne-

In C. P.

* This being intended as a further Supplement to Tidd's *Practice*, the chapters are numbered accordingly, so as to correspond with those in the *ninth* Edition of that work.

^a Tidd *Prac.* 9 Ed. 102, &c. The frequent references to Tidd's *Practice* are intended to shew the connexion between that work, and the new or additional matter contained in this Supplement.

^b Tidd *Prac.* 9 Ed. 116, &c.

^c *Id.* 121.

^d *Id.* 122.

^e *Id.* 145, &c.

^f *Id.* 319, &c.

^g *Id.* 116, &c.

^h *Id.* 321, &c.

ⁱ *Id.* 341, &c.

^k *Id.* 91. 353, &c.

^l *Id.* 91. 104.

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&c.

cessary, in the first instance, against peers, corporations, and hundredors ^a; the latter, not requiring personal service, was sometimes used, when the defendant kept out of the way, so that he could not be arrested, or personally served with process ^b: *secondly*, by *capias quare clausum fregit*, founded on a supposed original, which was the common mode of commencing actions in that court, and answered to the bill of *Middlesex* or *latitat* in the King's Bench ^c: *thirdly*, by *attachment* of privilege, at the suit of attornies, and officers of the court ^d: *fourthly*, by *bill*, which was two-fold; first, against attornies, and officers ^e; and secondly, against members of the House of Commons ^f. If a man were in the *Fleet*, it seems that a plaintiff might have formerly had a *bill* of *debt* against him, in the same manner as, in the King's Bench, against a man in custody of the marshal ^g. In practice, actions against prisoners in custody of the warden of the *Fleet*, were commenced in the same manner as those against other persons, by *original writ* ^h.

In Exchequer.

In the Exchequer of Pleas, the means of commencing personal actions were, *first*, by *subpoena ad respondendum*, which was a process directed to the defendant, analogous to the *subpoena* in Chancery, or on the equity side of the Exchequer ⁱ: *secondly*, by *venire facias ad respondendum*, which was in the nature of an original writ, and was the process used at common law, against persons having privilege of parliament ^k: *thirdly*, by *quo minus capias*, which answered to the bill of *Middlesex* or *latitat* in the King's Bench, and *capias quare clausum fregit* in the Common Pleas ^l: *fourthly*, by *venire facias*, or *capias* of privilege, at the suit of attornies, and officers of the court ^m; and *lastly*, by *bill*, which was three-fold; first, against attornies, and officers ⁿ; secondly, against members of the House of Commons, on the statute 12 & 13 W. III. c. 3. § 2^o; and thirdly, against prisoners, in custody of the sheriff, &c. ^p, or warden of the *Fleet* ^q.

^a Tidd *Prac.* 9 Ed. 91. 104.

^b *Id.* *ib.*

^c *Id.* 91. 153.

^d *Id.* 320.

^e *Id.* 323.

^f *Id.* 116, &c.

^g *Id.* 91, 2.

^h *Id.* *ib.* 363, &c.

ⁱ *Id.* 156, 7.

^k *Id.* 155, 6.

^l *Id.* 157.

^m *Id.* 92. 321.

ⁿ *Id.* 92. 325.

^o *Id.* 116, &c.

^p *Id.* 341, &c.

^q *Id.* 92. 353, &c.

The process formerly used for the commencement of *personal* actions, in his Majesty's superior courts of law at *Westminster*, having been found, by reason of its great variety and multiplicity, very inconvenient in practice ^a, was abolished, and other writs substituted in lieu thereof, by the statute 2 W. IV. c. 39. intituled "*An Act for Uniformity of Process, in personal Actions, in his Majesty's Courts of law at Westminster.*" The writs authorized by that statute, and which are now used, for the commencement of *personal* actions, in any of the said courts, in the cases to which such writs are applicable, are

Abolished by
stat. 2 W. IV.
c. 39.

Writs authorized by that
statute, for com-
mencement of
personal actions.

I. A writ of *summons*, which is of two kinds: 1. In ordinary cases, where the action is not of a bailable nature, or it is not intended to hold the defendant to special bail: 2. Against members of parliament, to enforce the provisions of the statute 6 Geo. IV. c. 16. § 10.

II. A writ of *capias*, when the defendant is at large, or in custody of the sheriff, &c., and it is intended to hold him to special bail.

III. A writ of *detainer*, when the defendant is in custody of the *marshal* of the King's Bench, or *warden* of the Fleet prison, and it is intended to detain him in such custody.

The foregoing being declared by the statute ^b, to be the only writs for the commencement of *personal* actions, in any of the courts aforesaid, in the cases to which such writs are applicable, *original* writs are consequently abolished, in *personal* actions against *peers*, *corporations*, and *hundredors*, as well as against *common* persons; as is also the mode of commencing such actions by *bill*, against *members* of the House of Commons, *attornies*, and *officers* of the courts, and *prisoners* in custody of the marshal, or sheriff, &c. and by *attachment*, or *capias*, of privilege, at the suit of *attornies* and officers of the courts, in cases to which the writs authorized by the statute are applicable; and there is of course an end, in such cases, to the distinction between the proceedings by *original* writ and by *bill*^c. It should be observed, however, that

Original writs,
and mode of pro-
ceeding by bill,
&c., in what
cases abolished.

^a Preamble to stat. 2 W. IV. c. 39. 70 to 101. 121, &c. 132, &c.

And for the variety and multiplicity of process in *personal* actions, previous to that statute, and the inconveniences attending the same, see the first Report of the Common Law Commissioners, pp.

^b 2 W. IV. c. 39. § 21.

^c This distinction chiefly depended on the manner in which *original* writs and the process thereon, and process by *bill*, were made returnable; and on the mode

Cases to which
stat. 2 W. IV.
c. 39, does not
apply.

this statute, being confined to *personal* actions, did not apply to such as were purely *real*, as the writ of *right*, *formedon*, &c., or to *mixed* actions, as *dower unde nihil habet*, *quare impedit*, *ejectment*, *waste*, &c. But, by a subsequent statute^a, which has been noticed in a preceding chapter, all *real* and *mixed* actions are to be abolished, except the writ of *right* of *dower*, writ of *dower unde nihil habet*, *quare impedit*, and *ejectment*. These excepted actions, however, may still be commenced by *original* writ; and the action of *ejectment* may be brought, as before the statute, either by *original* writ, in the King's Bench or Common Pleas, or by *bill*, in the King's Bench, or Exchequer of Pleas. The action of *replevin* also, which is a *personal* action, and other *personal* actions commenced in *inferior* courts, and removed from thence into *superior* ones, do not seem to be within the statute: for besides that these actions are not commenced in any of the superior courts of law at Westminster, there is a clause in the act^b, that "nothing therein

of computing the *time* allowed for particular purposes in the course of the suit. *Original* writs, and the process thereon, were formerly made returnable on *essoign* or *general* return days, as in *eight* days of St. *Hilary*, &c., of which there were *four* in each term, except *Easter*, which had *five*; but process by *bill* was made returnable on *particular* return days, as on *Monday* (or other day of the week) next after *eight* days of St. *Hilary*, &c. The *essoign* or *general* return days were fixed and regulated by the statutes 11 Geo. IV. & 1 W. IV. c. 70. § 6. and 1 W. IV. c. 3., for which see 2d Sup. to Tidd *Prac.* 9 Ed. 7, &c.; and for the *essoign* or *general* return days of *original* writs, &c., as fixed and regulated thereby, see *id.* 9, 10. But there was no mention made, in either of these statutes, of *particular* return days, or return days of process by *bill*: Such process, therefore, might have been made returnable on any day of the term, not being *Sunday*: and, with regard to the return days of writs in general, it was deemed sufficient in all cases to describe them by the days of the

month on which they happened, as on the — day of — instant, (or next). In computing the *time* allowed by the practice of the courts for appearing and pleading, &c. the number of days, when not otherwise expressed, was in general reckoned *exclusively*, in actions by *bill* in the King's Bench, and *inclusively* in actions by *original* in that court, or in the Common Pleas, (Tidd *Prac.* 9 Ed. 238. 466. 2d Supplement thereto, 10. 50.): but, by a late general rule of all the courts, (R. H. 2 W. IV. reg. 8. 8 Bing. 307, 8.,) it is ordered, that "in all cases in which any particular number of days, not being expressed to be clear days, is prescribed by the rules or practice of the courts, the same shall be reckoned *exclusively* of the first day, and *inclusively* of the last day, unless the last day shall happen to fall on a *Sunday*, *Christmas* day, *Good Friday*, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned *exclusively* of that day also."

^a 3 & 4 W. IV. c. 27. § 36. *Ante*, 12.

^b 2 W. IV. c. 39. § 19. *Ante*, 51.

"contained shall extend to any cause removed into either of the said courts, by writ of *pone, certiorari, recordari facias loquelam, habeas corpus*, or otherwise." The *King*, not being named in this statute, is not bound thereby; and consequently may proceed by *scire facias*, which is a *judicial* writ, issuing out of and under the seal of the court of Exchequer^a, for the recovery of a debt due to him on bond, recognizance, or judgment^a, &c., or found by inquisition on an outlawry^b, or extent^c; or by an *original* writ of *scire facias*, to repeal letters patent^d. And a *subject* is not prohibited by the statute, from suing out a *scire facias*, which is, for some purposes, considered as a *personal* action^e, to obtain execution on a judgment, or recognizance^f; or a writ of *error*, which is an *original* writ^g, for reversing a judgment. It has also been determined, that the statute applies to the *commencement* of actions only, and not to the *continuance* of actions, commenced before it came into operation^h; and that it did not, therefore, prevent the signing of a *pluries* bill of *Middlesex*, in a suit previously commenced^h.

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&c.

The writs of *summons* and *capias*, it will be observed, are only *primary*, or writs taken out in the first instance, to compel the defendant to appear, or put in and perfect special bail to the action: But besides these, and consequent upon them, other auxiliary writs are authorized by the statute to be issued, for the same purposes. These writs are, 1. The writ of *distringas*, which issues where the defendant has not been personally served with the writ of *summons*, and has not, according to the exigency thereof, appeared to the action, and cannot be compelled so to do, without some more efficacious process¹: 2. The writ of *alias* or *pluries summons*, or *capias*², for continuing the cause, if the defendant has not been served therewith, or arrested thereon: 3. The writs of *exigi facias*, and proclamation, &c. for outlawing, or waiving, the defendant, upon the return of *non est inventus* to a writ of *capias*, or of *non est*

Primary and
auxiliary writs.

^a Tidd *Prac.* 9 Ed. 1091.

Kretchman, 2 Durnf. & E. 46.

^b *Id.* 137.

^f Tidd *Prac.* 9 Ed. 1096, &c.

^c *Id.* 1068.

^g *Id.* 1134. 1141.

^d *Id.* 1091. 1094.

^h *Storr v. Bowles*, 4 Barn. & Ad. 112.

^e *Co. Lit.* 290. b. 291. a. *Grey v. Jones*, 2 Wils. 251. *Pulteney v. Townson*, 2 Blac. Rep. 1227. *Winter v.*

1 Dowl. Rep. 516. S. C.

¹ Stat. 2 W. IV. c. 39. § 3.

² *Id.* § 10.

Serviceable or
bailable writs.

inventus, and *nulla bona*, to a writ of *distringas*^a. When the writ is to be served, it is said to be *serviceable*; and when the defendant is to be arrested thereon, it is of a *bailable* nature.

Process in per-
sonal actions,
how treated of.

In treating of the process in *personal* actions, as prescribed by the statute 2 W. IV. c. 39. it is proposed to consider, in the present chapter, the writs of *summons*, and *distringas*, which are of a serviceable nature, with the service and execution thereof; and, in the next chapter, the writ of *capias*, which is of a bailable nature, with the execution of it, and process of outlawry.

Writ of sum-
mons what, and
in what cases it
lies.

The writ of *summons* is a judicial writ, founded on the above statute^b, by which it is enacted, that "the process in all *personal* actions, commenced in either of the said courts, in cases where it "is not intended to hold the defendant to special bail, or to proceed against a member of parliament, according to the provisions "contained in the statute passed in the sixth year of the reign of "his late Majesty King George the Fourth^c, intituled *An Act to amend the Laws relating to Bankrupts*, shall, whether the action "be brought by or against any person entitled to the privilege of "peerage, or of parliament, or of the court wherein such action "shall be brought, or of any other court, or to any other privilege, "or by or against any other person, be according to the form contained in the schedule to that act, (2 W. IV. c. 39.) annexed, "marked No. 1.; and which process may issue from either of the "said courts, and shall be called a writ of *summons*."^d This writ is considered as the commencement of the action, for all purposes^e; and may, it seems, be issued against prisoners in custody of the sheriff, &c., or of the marshal of the King's Bench, or warden of the *Fleet* prison, as well as against defendants who are not in custody.

How considered.

May be issued
against prison-
ers, in custody
of sheriff, &c.

Privileges of at-
tornies on.

The privileges of an attorney to sue, in his own court, by *attachment* of privilege^f, in the King's Bench and Common Pleas, or by *capias* of privilege in the Exchequer, and to be sued by *bill*^g in all the courts,

^a Stat. 2 W. IV. c. 39. § 5.

^b § 1.

^c 6 Geo. IV. c. 16. § 10.

^d Append. to Chap. IV, &c. § 2.

^e *Alston v. Underhill*, 1 Crompt. & M. 492.

^f As to the *attachment*, or *capias*, of

privilege, at the suit of an attorney, &c. and the proceedings thereon, see Tidd *Prac.* 9 Ed. 80, 81. 319, &c.

^g As to the *bill* against an attorney, and the proceedings thereon, see *id.* 80, 81. 321, &c.

are taken away by this statute. But he still retains his privilege of freedom from arrest; it being declared by the act^a, that "nothing therein contained shall subject any person to arrest, who by reason of any privilege, usage, or otherwise, may now by law be exempt therefrom." An attorney, therefore, can only be sued by serviceable process, viz. by writ of *summons*: It is supposed, however, that he still retains the privilege of being sued in the court of which he is an attorney^b; and that there is nothing in the act, to take away his privilege of laying the venue in *Middlesex*, when he is plaintiff^c.

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&c.

The writ of *summons* is directed to the defendant; commanding him, that within *eight* days after the service of the writ on him, *inclusive* of the day of such service, he do cause an appearance to be entered for him, in the court in which the action is brought, in an action on promises, (or debt, &c. *as the case may be*,) at the suit of the plaintiff; and requiring the defendant to take notice, that in default of his so doing, the plaintiff may cause an appearance to be entered for him, and proceed therein to judgment and execution^d. In this writ, and every copy thereof, the place and county of the residence, or supposed residence of the defendant, or wherein he is, or shall be supposed to be, are required to be mentioned^e. And it is a rule, that the form prescribed by the act shall be strictly adhered to: Therefore, where the name of the plaintiff was not stated in the writ of *summons*, as the person who would enter an appearance for the defendant, if he did not comply with the exigency of the writ, the court set it aside for irregularity^f: And

Direction, and
form of writ.

Form to be
strictly adhered
to.

^a § 19. and see *Beck v. Lewin*, T. 56 Geo. III. K. B. *Pearson v. Henson*, 4 Dowl. & R. 73. Anon. 1 Dowl. Rep. 3. 1 Leg. Obs. 44. S. C. K. B. *Adams v. Bugby*, 12 Moore, 255. C. P.

^b *Chapm. K. B. 2 Addend. 75.*

^c *Id.* 76. and see *Dax Excheq. 2 Ed. 15, 16. Sed quare?* and see *Welland v. Frument*, Barnes, 479. Cas. Pr. C. P. 132. Pr. Reg. 419. S. C. *Girdler v. Wathews*, Barnes, 484. Cas. Pr. C. P. 145. Pr. Reg. 420. S. C. *Mounsey v. Watson*, 7 Barn. & C. 683. wherein it was holden, that if the plaintiff, though privileged, sue as a common

person, by *original* or otherwise, he loses his privilege of retaining the venue in *Middlesex*.

^d Sched. to stat. 2 W. IV. c. 39. No. 1. Append. to Chap. IV, &c. § 2.

^e Stat. 2 W. IV. c. 39. § 1. and see *Wright v. Warren*, 3 Moore & S. 164. *per Alderson, J.*

^f *Smith v. Crump*, 1 Dowl. Rep. 519. 5 Leg. Obs. 384, 5. S. C. *per Parke, J.* The cases referred to in the *Legal Observer* were, for the most part, decided by a single judge, or baron, in the courts of King's Bench, and Exchequer; and are many of them reported by Mr. *Dowling*.

CHAP. IV, proceedings were set aside, where the writ of *summons* was in an
&c. action of *trespass on the case* upon promises^a. But where, in an action against several defendants, the writ stated that, in default of their entering an appearance themselves, the plaintiff "may cause an appearance to be entered for *you*," without adding "and *each* of you," the judge held, that the words "for *you*" must be taken distributively, as applying to each of the defendants, and therefore that the notice was sufficient^b: And where the name of the chief clerk had been omitted on the writ, the judge refused to set it aside for irregularity; it being quite sufficient for a person suing out writs of *summons* to adopt the form given in the schedule to the act^c.

Names of parties.
Misnomer in,
not pleadable in
abatement.

The writ of *summons* should regularly contain the christian and surnames of the parties: But a *misnomer*, or mistake in their names, cannot now be pleaded in abatement; it being enacted, by the statute 3 & 4 W. IV. c. 42^d, that "no plea in abatement for a *misnomer* shall be allowed in any personal action; but that in all cases in which a misnomer would, but for that act, have been by law pleadable in abatement in such actions, the defendant shall be at liberty to cause the declaration to be amended, at the costs of the plaintiff, by inserting the right name, upon a judge's summons, founded on an *affidavit* of the right name; and in case such summons shall be discharged, the costs of such application shall be paid by the party applying, if the judge shall think fit."

Description of
defendant.

In describing the defendant, if he has a name of dignity, it must be stated in the writ, or he may plead in abatement: but it is not necessary, in an action against a peer, or member of the House of Commons, to describe him as having privilege of peerage, or parliament^e. In actions against *corporations* aggregate, they must be sued by their corporate name^f; and when *hundredors* are sued on the statute 7 & 8 Geo. IV. c. 31., they must be described as "men inhabiting within the hundred^g, &c.": but, with these ex-

^a King v. Skeffington, 1 Crompt. & M. 363. 1 Dowl. Rep. 686. S. C.

^b Engleheart v. Edwards, 6 Leg. Obs. 188. per Patterson, J.

^c Wilson v. Joy, *id.* 413, 14. per Taunton, J.

^d § 11. and see same statute, § 12.,

as to the *initials* of christian names, in bailable process.

^e Cantwell v. Earl of Stirling, 1 Moore & S. 297. 8 Bing. 174. S. C.

^f 2 Inst. 666. Com. Dig. tit. *Pleader*, 2 B. 1.

^g Tidd *Prac.* Append. 9 Ed. 36.

ceptions, it is sufficient, in general, to describe the defendant by his christian and surname, without any further addition. And, in an action not bailable, if the plaintiff sue *qui tam*^a, or as *executor* or *administrator*^b, or *assignee* of a bankrupt, &c. the process need not state the character in which he sues; nor, in an action against an *executor* or *administrator*, &c. the character in which he is sued^c. In describing the nature of the action, the *forms* in the schedule to the statute are applicable only to actions of *assumpsit* and *debt*: In other cases, it would, it seems, be deemed sufficient to describe the nature of the action generally, as "in an action of *covenant*, *account*, *annuity*, *detinue*, trespass on the *case*, or *trespass*:" But proceedings, we have seen^d, were set aside, where the writ of *summons* was in an action of *trespass on the case* upon promises^e.

Special character of parties.

Nature of action.

The *form* of the writ of *summons*, and other writs mentioned in the schedule to the act, is adapted to the case of a *single* plaintiff or defendant only^f; but when there are *several* plaintiffs or defendants in a joint action, all their names must be included therein^g. In actions not bailable, the plaintiff was formerly allowed to join *four* defendants, for *separate* causes of action, in one writ, and to declare against them severally^h: but, by a general rule of all the courtsⁱ, "every writ of *summons*, *capias*, and *detainer*, shall contain the names of all the defendants, if more than one, in the action; and shall not contain the name or names of any defendant or defendants, in more actions than one."

When there are several parties.

Joining several defendants in one writ.

^a *Weavers' Company v. Forrest*, 2 Str. 1232. *Lloyd v. Williams*, 2 Blac. Rep. 722. 3 Wils. 141. S. C.

^b *Ashworth v. Ryal*, 1 Barn. & Ad. 19. and see *Isley v. Isley*, 2 Crompt. & J. 330, 31. 2 Tyr. Rep. 214. S. C.

^c *Watson v. Pilling*, 6 Moore, 66. 3 Brod. & B. 4. S. C.

^d *Ante*, 65, 6.

^e *King v. Skeffington*, 1 Crompt. & M. 363. 1 Dowl. Rep. 686. S. C.

^f Sched. to stat. 2 W. IV. c. 39. No. 1. 3, 4, 5, 6. Append. to Chap. IV, &c. § 2. 8. 20. to Chap. VII, &c. § 2. to Chap. XV. § 2.

^g See the forms of entering an appearance on serviceable process, (Sched. to stat. 2 W. IV. c. 39. No. 2.) which are adapted to the case of *several* defendants; and see that statute, § 4.

^h *Anon. Com. Rep.* 74. *Holland v. Johnson*, 4 Durnf. & E. 695. and see *Yardley v. Burgess*, *id.* 697. *Thompson v. Cotter*, 1 Maule & S. 55.

ⁱ R. M. 3 W. IV. reg. 1. 2 Moore & S. 328. 9 Bing. 443.; and see R. E. 8 Geo. IV. K. B. 6 Barn. & C. 639. 9 Dowl. & R. 677. *Tidd Prac.* 9 Ed. 148, 9. and 2d Supplement thereto, 12, 13.

Case of several defendants, one of whom is served with copy of *capias*.

When there are several defendants, one of whom is not meant to be arrested, the plaintiff, or his attorney, is authorized by the statute^a, to order the sheriff, or other officer or person to whom the writ of *capias* shall be directed, to arrest one or more only of the defendants therein named, and to serve a copy thereof on one or more of the others; which order shall be duly obeyed by such sheriff, or other officer or person: and such service shall be of the same force and effect, as the service of the writ of *summons* therein before mentioned, and no other. And when there are two defendants, one of whom is at large, and the other in custody of the marshal of the King's Bench, or warden of the *Fleet* prison, it may be necessary to issue two writs; one, of *summons* or *capias*, against the defendant who is at large, and the other of *detainer*, against the defendant who is in custody.

When one defendant is at large, and another in custody of marshal, &c.

Date and teste of writ of summons, &c.

The rule, with regard to the *date* and *teste* of writs of *summons*, &c. is, that "every writ, issued by authority of the act, shall bear "*date* on the day on which the same shall be issued^b; and shall "*be tested* in the name of the Lord Chief Justice, or Lord Chief Baron, of the court from which the same shall issue; or, in case "*of a vacancy of such office, then in the name of a senior puisne* "*judge of the said court:*"^c which requisite is not satisfied, by a day being *indorsed* on the writ^d. There is no particular time appointed for the *return* of the writ of *summons*; but the defendant is required thereby, to cause an appearance to be entered for him, in the court out of which the writ issued, within *eight* days after the service of the writ, inclusive of the day of such service^e.

Memorandum, and indorsements on.

It may next be proper to notice the *memorandum* required to be subscribed to, and *indorsements* made on, the writ of *summons*, &c.

^a 2 W. IV. c. 39. § 4.

^b The writs of *exigent* and proclamation, however, appear to be exceptions to this rule. And the statute seems to have superseded the necessity of the officer's setting down, upon the writ or process for arresting the defendant, the day and year of ~~his~~ signing the same, as required by the statutes 5 & 6 W. & M. c. 21. § 4. and 9 & 10

W. III. c. 25. § 42; and see stat. 6 Geo. I. c. 21. § 54. Tidd *Prac.* 9 Ed. 158.

^c Stat. 2 W. IV. c. 39. § 12.

^d Anon. 1 Dowl. Rep. 654. and see Millar v. Bowden, 1 Price, N. R. 104. 1 Crompt. & J. 563. 2 Tyr. Rep. 112. S. C. Tidd *Prac.* 9 Ed. 158.

^e Sched. to stat. 2 W. IV. c. 39. No. 1. Append. to Chap. IV, &c. § 2.

By the statute 2 W. IV. c. 39^a, "no writ, issued by authority of that act, shall be in force for more than *four* calendar months from the day of the date thereof, including the day of such date:" and accordingly, a *memorandum* is required to be subscribed to the writs of *summons* and *capias*, stating that they are to be served or executed within that period^b. By a previous statute^c, it was necessary, that "every writ and process for arresting the body, and every writ of execution, or some *label* annexed to such writ or process, and every warrant made out thereon, should, before the service or execution thereof, be subscribed or indorsed with the name of the attorney, clerk in court, or solicitor, written in a common legible hand, by whom such writ, &c. respectively were sued forth; and where such attorney, &c., was not the person *immediately* retained or employed by the plaintiff, then also with the name of the attorney, &c., so immediately retained or employed, to be subscribed or indorsed and written in like manner." By a subsequent statute^d, where bailable process was issued by the plaintiff in his own person, the sheriff was required not to execute the same, unless delivered by an attorney, &c., and indorsed with his name and place of abode. And now, by the statute 2 W. IV. c. 39. "every writ issued by authority of that act, shall be *indorsed* "with the name and place of abode of the attorney actually suing out the same; and in case such attorney shall not be an attorney of the court in which the same is sued out, then also with the name and place of abode of the attorney of such court, in whose name such writ shall be taken out; but in case no attorney shall be employed for that purpose, then with a *memorandum*, expressing that the same has been sued out by the plaintiff in person, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house, of such plaintiff's residence, if any such there be."^e And, by a general rule of all the courts^f, "when the attorney actually suing out any writ, shall sue out the same as agent for an attorney in the country, the name and place of abode of such attorney in the country shall also be

Duration of writs.

Indorsement on, of name and place of abode of plaintiff, or his attorney, by whom issued.

Of country attorney's name, &c. on writ sued out by agent.

^a § 10.

^d Stat. 7 & 8 Geo. IV. c. 71. § 8.

^b Sched. to stat. 2 W. IV. c. 39. No.

^e Stat. 2 W. IV. c. 39. § 12. Ap-

1. 4. 6. Append. to Chap. IV, &c. § 3.

pend. to Chap. IV, &c. § 4. 10. to Chap.

9. and to Chap. VII, &c. § 4.

VII, &c. § 6. and to Chap. XV. § 3.

^c Stat. 2 Geo. II. c. 23. § 22; and

^f R. M. 3 W. IV. reg. 9. 2 Moore

see Tidd *Prac.* 9 Ed. 159.

& S. 335. 9 Bing. 445.

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indorsed upon the said writ." On a motion to set aside a writ of *summons*, it appeared that the name of the firm to which the attorney on the record belonged, was indorsed on the writ, instead of the attorney himself merely; and that the residence of the attorney was stated to be "*Gray's Inn, London*," although no part of *Gray's Inn* was in *London*; which the judge held to be sufficient ^a.

Attorney to declare whether writ is issued by his authority, &c.

It is also enacted, that "every attorney whose name shall be "indorsed on any writ issued by authority of that act, shall, on demand in writing made by or on behalf of any defendant, declare "forthwith, whether such writ has been issued by him, or with his "authority or privity; and if he shall answer in the affirmative, "then he shall also, in case the court, or any judge of the same, or "of any other court, shall so order and direct, declare in writing, "within a time to be allowed by such court or judge, the profession, occupation, or quality and place of abode of the plaintiff; "on pain of being guilty of a contempt of the court from which

If not so issued, defendant may be discharged;

"such writ shall appear to have been issued ^b: and if such attorney "shall declare that the writ was not issued by him, or with his "authority or privity, the said court, or any judge of either of the "said courts, shall and may, if it shall appear reasonable so to do, "make an order for the immediate discharge of any defendant or "defendants, who may have been arrested on any such writ, on "entering a common appearance."^b And, by a general rule of all the courts ^c, "if any attorney shall, as required by the said act, declare that any writ of *summons*, or writ of *capias*, upon which his name is indorsed, was not issued by him, or with his authority or privity, all proceedings upon the same shall be stayed, until further order."

and all proceedings stayed, until further order.

Indorsement of amount of debt and costs.

To ascertain the amount of the debt and costs claimed by the plaintiff, and to give the defendant an opportunity of paying them in the first instance, it is ordered, by a late rule of all the courts ^d, that "upon everyailable writ and warrant, and upon the copy of any process served for the payment of any *debt*, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ or process, arrest, or copy and

^a *Engleheart v. Edwards*, 6 Leg. Obs. 138. *per Patteson, J.*, but see *Constable v. Johnson*, 1 Crompt. & M. 88. 3 Tyr. Rep. 231. S. C.

^b Stat. 2 W. IV. c. 39. § 17.

^c R. M. 3 W. IV. reg. 14. 2 Moore & S. 336. 9 Bing. 447.

^d R. H. 2 W. IV. reg. II. 8 Bing. 305, 6. 2 Sup. to Tidd *Prac.* 9 Ed. 15.

service, and attendance to receive debt and costs^a; and that upon payment thereof, within *four* days, to the plaintiff or his attorney, further proceedings will be stayed; but the defendant shall be at liberty, notwithstanding such payment, to have the costs taxed; and if more than one *sixth* shall be disallowed, the plaintiff's attorney shall pay the costs of taxation:"^b which rule is declared, by a subsequent one^c, "to be applicable to all writs of *summons*, *distringas*, *capias*, and *detainer*, issued under the authority of the said act, and to the copy of every such writ." But the court will not set aside process, on account of the debt and costs not being indorsed upon it, according to the above rules, unless it appear by *affidavit*, that the cause of action was a *debt*^d: And, by a general rule of all the courts^e, "if the plaintiff, or his attorney, shall omit to insert in, or indorse on any writ, or copy thereof, any of the matters required by the said act^f to be by him inserted therein, or indorsed thereon, such writ, or copy thereof, shall not on that account be held void; but may be set aside as irregular, upon application to be made to the court out of which the same shall issue, or to any judge." This rule has been holden to be compulsory on the plaintiff^g; and it applies to process issued under the 2 W. IV. c. 39. against attorneys^h. It has also been determined, on this rule, that a motion to set aside the service of a writ of *distringas*, on the ground of an irregularity in the indorsements thereon, &c. must be made within a reasonable time after the service thereof; and that *eighteen* days is an unreasonable delay in this respect, provided the defendant might have come earlierⁱ.

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&c.

Consequence of
omitting in-
dorsements, &c.
on writ, or copy.

The writ of *summons* may issue from either of the superior courts of law at *Westminster*¹; and is required, by the act¹, to be issued by the officer of the courts respectively, by whom process serviceable in the county therein mentioned hath been heretofore issued from

From what
court, and by
what officer,
writ is issued.

^a Append. to Chap. IV, &c. § 5. 30. to Chap. VII, &c. §§ 7. 19. And for bills of costs, as allowed on taxation in all the courts, on the above rule, see *Bills of Costs*, K. B., published by *Marwell*, in 1832.

^b 2 Sup. to Tidd *Prac.* 9 Ed. 15.

^c R. M. 3 W. IV. reg. 5. 2 Moore & S. 330. 9 Bing. 444.

^d *Curwin v. Moseley*, 1 Dowl. Rep.

432. 4 Leg. Obs. 301. S. C. *per Paterson*, J.

^e R. M. 3 W. IV. reg. 10. 2 Moore & S. 335. 9 Bing. 445, 6.

^f 2 W. IV. c. 39.

^g *Tomkins v. Chilcote*, 6 Leg. Obs. 333. *per Taunton*, J.

^h *Wright v. Warren*, 3 Moore & S. 163.

ⁱ Stat. 2 W. IV. c. 39. § 1.

Rules to be made by judges of each court, for government of their own officers.

Rule thereon, for issuing, signing, and sealing writs, in K. B.

Signing, &c. now regulated by stat. 3 & 4 W. IV. c. 67.

Writs issued into *Middlesex*, how signed, &c. in K. B., and fees in what manner accounted for.

By whom signed, in C. P. and Exchequer.

Præcipe for writ of summons, &c.

such court : And there is a clause in the act^a, that "it shall and
 " may be lawful to and for the judges of each of the said courts,
 " from time to time, to make such rules and orders, for the gov-
 " ernment and conduct of the ministers and officers of their re-
 " spective courts, in and relating to the distribution and perform-
 " ance of the duties and business to be done and performed in the
 " execution of that act, as such judges may think fit and reason-
 " able ; provided always, that no additional charge be thereby im-
 " posed on the suitors." Under this clause, a rule was made by
 the judges of the court of King's Bench^b, that "all writs of *sum-*
mons, *distingas*, *capias*, and *detainer*, issued in the county of *Mid-*
dlesex, should be issued, signed, and sealed, by the signer of the
 bills of *Middlesex* ; and that all such writs, issued in any other
 county, shall be issued and signed by the signer of the writs in the
 King's Bench office, and sealed by the sealer of the writs, until
 further order." But the signing, sealing, and issuing of writs are
 now regulated by the statute 3 & 4 W. IV. c. 67^c, by which it
 is enacted, that "so much of the act passed in the second year of
 " his majesty's reign^d, as provides that the writ of *summons* there-
 " in mentioned shall be issued by the officer of the said courts re-
 " spectively, by whom process serviceable in the county therein
 " mentioned, hath been heretofore issued from such court, shall be,
 " and the same is thereby repealed ; and that from and after the
 " passing of that act, all writs of *summons*, *distingas*, *capias*,
 " and *detainer*, issued into the county of *Middlesex*, from the court
 " of King's Bench, shall be signed, sealed, and issued, and the fees
 " thereon shall be taken and accounted for, by the same person
 " or persons, and in like manner, as all other writs of *summons*, *dis-*
tingas, *capias*, or *detainer*, issued from the said court of King's
 " Bench, under and by virtue of the said recited act ; any law, cus-
 " tom, or usage to the contrary notwithstanding." In the Common
 Pleas, the writs are signed by the *filacer* of the county into which
 they are issued^e ; and, in the Exchequer, by the *master* and *pro-*
thonotary, in the name of the clerk of the pleas.

At the time of issuing the writ of *summons*, and every other writ
 issued under the authority of the act, it is usual for the plaintiff's
 attorney, though not required thereby, to deliver to the officer by

^a Stat. 2 W. IV. c. 39. § 18.

^b R. M. 3 W. IV. K. B.

^c § 1.

^d 2 W. IV. c. 39. § 18.

^e Imp. C. P. 6 Ed. 85. and see Tidd

Prac. 9 Ed. 154.

whom it is issued, a *præcipe*^a, or note of instructions, stating the county, nature of the writ, names of the parties, and cause of action, concisely, with the name of the plaintiff's attorney, and date. The costs to be allowed and charged for the writs authorized to be issued for the commencement of personal actions, are directed by the act^b, to be the same as for writs of *latitat*: And, by a general rule of all the courts^c, "a fee of *two* shillings and *six* pence is allowed to be taken, for signing all writs for compelling an appearance, whether of *summons*, *distringas*, *capias*, or *detainer*, and whether the same shall be the first writ, or an *alias* or *pluries* writ; and whether the same shall issue into the same county as the preceding writ, or into a different county; and a fee of *seven* pence for sealing the same."

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&c.

Costs of writs.

Fees for signing
and sealing writs
of summons, &c.

Within the time limited for the service of the writ of *summons*, it should be personally served, if possible, on the defendant; and it may be served by the plaintiff or his attorney, who are authorized by the statute^d to return the same, or by any one else, who is competent to swear to the service: And "every such "writ may be served, in the manner heretofore used^e, in the county

Service of writ.

By whom.

In what manner.

^a For the form of a *præcipe* for a writ of *summons*, see Append. to Chap. IV, &c. § 1.

^b Stat. 2 W. IV. c. 39. § 21.

^c R. M. 3 W. IV. reg. 2. 2 Moore & S. 329. 9 Bing. 443.

^d 2 W. IV. c. 39. § 10.

^e For the manner of *summoning* the defendant, before the statute, in personal actions commenced by special *original* writ, in the King's Bench or Common Pleas, see Tidd *Prac.* 9 Ed. 109.; by *capias quare clausum fregit*, in the latter court, *id.* 111.; by *venire facias*, in the Exchequer of Pleas, *id.* 155; on stat. 7 & 8 Geo. IV. c. 71. § 5. *id.* 118, 14. 155; and in actions against peers, *id.* 118, 19; members of the House of Commons, *id.* 120; corporations, *id.* 121; hundredors, *id.* 123; and inhabitants of county of a city, or liberty, &c., *id.* 126: And as to the service of common process against the person, and by whom, when,

where, and how it should be served, (which is probably the manner of service intended by the statute,) see *id.* 167, 8, 9. Where the defendant resided in a county palatine, it was formerly holden, that he should be served with a copy of the *process* issuing out of the superior court, and not of the *mandate* from the officer to whom it was directed. Griffith *v.* Allcock, 2 Barnard. K. B. 327. 337. 398. Byers *v.* Whitaker, Pr. Reg. 344. Barnes, 406. S. C. Griffin *v.* Higgin, 1 Dowl. Rep. 45. 2 Leg. Obs. 125, 6. S. C. *per* Taunton, J. Tidd *Prac.* 9 Ed. 168. But it was afterwards decided, in the Common Pleas, that service of a writ directed to the chamberlain of the county palatine of *Chester*, was irregular, without his mandate being issued to the sheriff. Earl of Shrewsbury *v.* Haycroft, 6 Bing. 194. 3 Moore & P. 471. S. C. And, in a subsequent case, it was determined by the court of King's Bench, that

On border of county.

When parcel of one county is surrounded by another.

When writ is issued against corporation aggregate.

Inhabitants of hundred, &c.

Inhabitants of county of city or town, &c.

In action against two or more defendants.

Against husband and wife.

Indorsement on writ, of day of service.

When to be made, and consequence of not making it.

"therein mentioned, or within two hundred yards of the border thereof, and not elsewhere."^a And where a district or place, being parcel of one county, is wholly situate within and surrounded by another, every such district and place shall and may, for the purpose of the service of such writ, be deemed and taken to be part as well of the county wherein it is so situate, as of the county whereof the same is parcel^b.

When the writ of *summons* is issued against a *corporation aggregate*, "it may be served on the mayor, or other head officer, or on "the town clerk, clerk, treasurer, or secretary of such corporation^c; "and every such writ issued against the inhabitants of a *hundred*, "or other like district, may be served on the high constable thereof, or any one of the high constables thereof^c; and every such "writ, issued against the inhabitants of any county of any city or "town, or the inhabitants of any franchise, liberty, city, town, or "place, not being part of a hundred or other like district, on some "peace officer thereof."^c In an action against two or more defendants, each of them must be served with a copy of the process^d: But, in an action against husband and wife, it is deemed sufficient to serve the husband only^e. The person serving the writ of *summons* is required by the act^f, to indorse on the writ, the day of the month and week of the service thereof: And, in order to give effect to this enactment, it is ordered, by a general rule of all the courts^g, that "the person serving a writ of *summons* shall, within *three* days at least after such service, indorse on such writ, the day of the week and month of such service; otherwise the plaintiff shall not be at liberty to enter an appearance for the defendant, according to the statute: and every *affidavit*, upon which

where a non-bailable writ of *latitat* issued into the county palatine of *Lancaster*, and a mandate thereupon was obtained from the Chancellor to the sheriff, service of either on the defendant was sufficient. *Ashbrook v. Townley*, 2 Barn. & Ad. 416.

^a Stat. 2 W. IV. c. 39. § 1.

^b *Id.* § 20.

^c *Id.* § 13. For the manner of serving process, before the statute 2 W. IV. c. 39, in actions against *corporations*, see *Tidd Prac.* 9 Ed. 121; against *hun-*

dredors, on stat. 7 & 8 Geo. IV. c. 31. § 4. *id.* 123; and against inhabitants of the county of a city, or liberty, &c., *id.* 126.

^d *Worley v. Bull*, Pr. Reg. 351.

^e *Buncombe v. Love and wife*, Barnes, 406. *Collins v. Shapland and wife*, *id.* 412. Pr. Reg. 351. S. C.

^f § 1. Sched. thereto, No. 1. Append. to Chap. IV, &c. § 6.

^g R. M. 3 W. IV. reg. 3. 2 Moore & S. 329. 9 Bing. 443, 4.

such an appearance shall be entered, shall mention the day on which such indorsement was made." Where the writ was irregular, but the service was regular, and the defendant moved to set aside the service for irregularity, the court discharged the rule^a. And if it be doubtful, whether a defendant has been personally served, the court will not, on motion, interfere to set aside the service sworn to^b.

Setting aside for irregularity.

Having thus stated the mode of suing out and serving the writ of *summons*, in ordinary cases, it may here be proper to notice that "in all *personal* actions, wherein it shall be intended to proceed "against a member of parliament, according to the provisions of "the said statute made in the sixth year of the reign of his "late Majesty King *George* the Fourth^c, the process is required "to be according to the form contained in the said schedule, "marked No. 6.^d; and which process, and a copy thereof, shall "be in lieu of the *summons*, or original *bill* and *summons*, and "copy thereof, mentioned in the said statute."^e

Writ of summons against member of parliament, to enforce provisions of stat. 6 Geo. IV. c. 16. § 10.

This process is issued, on a proper *præcipe*^f, and directed to the defendant, (*stating his residence, or place of abode*;) commanding him, that within *one* calendar month next after personal service thereof on him, he do cause an appearance to be entered for him, in the court in which he is sued, in an action on promises, (*or debt, &c. as the case may be*;) at the suit of the plaintiff; and the defendant is thereby informed, that an *affidavit* of debt for the sum of —*l.* hath been filed in the proper office, according to the provisions of the said statute of 6 Geo. IV.; and that unless he pay, secure, or compound for, the debt sought to be recovered in that action, or enter into such bond as by the said act is provided, and cause an appearance to be entered for him, within *one* calendar month next after such service thereof, he will be deemed to have committed an act of bankruptcy, from the time of the service thereof."^g This summons is required to be indorsed with the name

Direction, and form of writ.

Indorsements on.

^a *Hasker v. Jarmaine*, 1 Crompt. & M. 408. Anon., 1 Dowl. Rep. 654. S. C. and see *Cohen v. Watson*, 3 Tyr. Rep. 238.

^b *Morris v. Coles*, 6 Leg. Obs. 315. Excheq.

^c 6 Geo. IV. c. 16. § 10. And for the proceedings on this statute, against

traders having privilege of parliament, see *Tidd Prac.* 9 Ed. 116, 17.

^d Append. to Chap. IV, &c. § 8.

^e Stat. 2 W. IV. c. 39. § 9.

^f Append. to Chap. IV, &c. § 7.

^g Sched. to stat. 2 W. IV. c. 39. No. 6. Append. to Chap. IV, &c. § 8.

CHAP. IV,
&c.Signing, sealing,
and service of.Proceedings on
service of, in or-
dinary cases.When defendant
has not been
personally
served.*Alias* and *pluries*
writs of sum-
mons.Memorandum
and indorse-
ments on.

of the plaintiff, or his attorney, in like manner as the writ of *capias*^a; and the amount of the debt and costs claimed by the plaintiff, where the action is brought for the recovery of a *debt*^b, should it seems be indorsed thereon. The writ of *summons* against a member of parliament, should be signed and sealed, and personally served on the defendant, in like manner as the ordinary writ of *summons*.

When the defendant, in ordinary cases, has been personally served with the writ of *summons*, he is commanded thereby, within *eight days inclusive* after such service, to cause an appearance to be entered for him, in the court out of which the writ issued; or, in default of his so doing, the plaintiff, on a proper *affidavit* of the service^c, may, by the terms of the writ^d, cause an appearance to be entered for him, and proceed therein to judgment and execution.

When the defendant has not been personally served with the writ of *summons*, it may be continued by *alias*^e, and *pluries*^e, as the case may require^f; or the plaintiff may apply to the court, or a judge, on a proper *affidavit*^g, for leave to issue a writ of *distringas*, to compel an appearance.

The *alias* and *pluries* writs of *summons*, which are seldom necessary, except for preventing the operation of the statute of limitations, are directed to the defendant; commanding him, (as *before*, or as *theretofore* he was commanded,) that within *eight days* after the service of the writ on him, *inclusive* of the day of such service, he do cause an appearance to be entered, &c. (as in the *first writ of summons*^h). In these writs, the place and county of the residence, or supposed residence of the defendant, or wherein he is, or may be supposed to be, should be inserted, as in the former writⁱ: and there should be the like *memorandum* and *indorsements* there-

^a Sched. to stat. 2 W. IV. c. 39. No. 6. Append. to Chap. IV. &c. § 10.

^b *Ante*, 71.

^c Append. to Chap. XII. § 1.

^d Sched. to stat. 2 W. IV. c. 39. No. 1. Append. to Chap. IV, &c. § 2.

^e Sched. to stat. 2 W. IV. c. 39. No. 1. Append. to Chap. IV, &c. § 13, 14. and to Chap. VII, &c. § 14, 15. And for the *alias* and *pluries capias* by original, before stat. 2 W. IV. c. 39, see

Tidd *Prac.* 9 Ed. 126; for the *alias* and *pluries* bill of *Middlesex* or *Intitat*, in the King's Bench, *id.* 147; for the *capias* by continuance, in the Common Pleas, *id.* 154; and for the *alias* and *pluries distringas*, in the Exchequer, *id.* 155.

^f Stat. 2 W. IV. c. 39. § 10.

^g Append. to Chap. IV, &c. § 16.

^h Sched. to stat. 2 W. IV. c. 39. No.

1. Append. to Chap. IV, &c. § 2.

ⁱ *Ante*, 65.

on, as on that writ^a. These writs are issued, on proper *præ-*
ripes^b: And, by a general rule of all the courts^c, they may, if
 the plaintiff shall think it desirable, be issued into another county;
 the plaintiff, in such case, describing the defendant therein, as
late of the place of which he was described in the first writ of
 summons^d. The forms of these writs are given in the rule^e, and
 will be found in the *Appendix*^f. May be issued
into another
county.

It should be remembered, however, that by a *proviso* in the act^g,
 which has been noticed in the first chapter^h, “no first writ shall
 “be available, to prevent the operation of any statute, whereby the
 “time for the commencement of the action may be limited, unless
 “the defendant shall be arrested thereon, or served therewith, or
 “proceedings to or towards outlawry shall be had thereupon; or
 “unless such writ, and every writ, if any, issued in continuation of
 “a preceding writ, shall be returned *non est inventus*, and entered
 “of recordⁱ, within *one* calendar month next after the expiration
 “thereof, including the day of such expiration; and unless every
 “writ, issued in continuation of a preceding writ, shall be issued
 “within *one* such calendar month after the expiration of the pre-
 “ceding writ, and shall contain a *memorandum* indorsed thereon,
 “or subscribed thereto, specifying the day of the date of the first
 “writ^k; such return to be made, in bailable process, by the sheriff
 “or other officer to whom the writ shall be directed, or his suc-
 “cessor in office, and, in process not bailable, by the plaintiff, or
 “his attorney, suing out the same, as the case may be.”^l Proviso as to
statute of limit-
ations.

The *alias* and *pluries* writs of *summons* should be signed, sealed,
 and served, in like manner as the first writ^m. But if the defendant
 cannot be personally served therewith, the plaintiff must apply to Signing, sealing,
and service of
alias, &c.

^a Append. to Chap. IV, &c. §§ 3, 4, 5.

^b *Id.* § 12.

^c R. M. 3 W. IV. reg. 6. 2 Moore
 & S. 330, 31. 9 Bing. 444.

^d Append. to Chap. IV, &c. § 14.

^e R. M. 3 W. IV. reg. 7. 2 Moore
 & S. 331. 9 Bing. 445.

^f Append. to Chap. IV, &c. § 14.

^g Stat. 2 W. IV. c. 39. § 10.

^h *Ante*, 51.

ⁱ For entries of writs of *summons*,
 and *capias*, &c. of record, to prevent the
 operation of the statute of limitations, see

Append. to Chap. I. §§ 1, 2.

^k Append. to Chap. IV, &c. § 15.

^l Stat. 2 W. IV. c. 39. § 10. And
 as to the process necessary to be sued
 out, before that statute, for the com-
 mencement of personal actions, in the
 superior courts of common law at
Westminster, in order to prevent the
 operation of the statute of limitations, see
Tidd Prac. 9 Ed. 27, 8; and for the
 manner of entering it on the roll for that
 purpose, *id.* 162.

^m *Ante*, 72.

Proceedings, when defendant cannot be personally served.

the court or a judge, on a proper *affidavit*^a, for leave to issue a *distringas*, to compel his appearance. The plaintiff, however, cannot move for a *distringas*, on this statute, until the expiration of *eight* days after a copy of the writ of *summons* has been left with the defendant, on the last attempt to serve him personally^a.

Writ of *distringas*, when it lies.

The writ of *distringas* is founded on the statute 2 W. IV. c. 39^b; by which it is enacted, that "in case it shall be made appear by "*affidavit*, to the satisfaction of the court out of which the process "issued, or, in vacation, of any judge of either of the said courts, "that any defendant has not been personally served with any such "writ of *summons* as therein before mentioned, and has not, according to the exigency thereof, appeared to the action, and "cannot be compelled so to do, without some more efficacious "process, then and in any such case, it shall be lawful for such "court, or judge, to order a writ of *distringas* to be issued^c, directed "to the sheriff of the county wherein the dwelling-house or place "of abode of such defendant shall be situate, or to the sheriff of "any other county, or to any other officer to be named by such "court or judge, in order to compel the appearance of such defendant; which writ of *distringas* shall be in the form^d, and with "the notice subscribed thereto^e, mentioned in the schedule to that "act, marked No. 3."^f

Affidavit for obtaining.

In order to obtain a *distringas*, the *affidavit*^g, which is similar to that before required to ground a motion for a *distringas*, on the statutes 51 Geo. III. c. 124, § 2, and 7 & 8 Geo. IV. c. 71, § 5^h;

^a *Brian v. Stretton*, 1 Crompt. & M. 74. 3 Tyr. Rep. 163. S. C.; and see *Atkins v. Lowther*, 5 Leg. Obs. 144. *Hill v. Mould*, 3 Tyr. Rep. 162. n.

^b § 3.

^c For the form of the rule of court in term time, and judge's order for drawing it up in vacation, see Append. to Chap. IV, &c. §§ 17, 18.

^d Append. to Chap. IV, &c. § 20.

^e *Id.* § 29.

^f Stat. 2 W. IV. c. 39. § 3. The proceedings by *distringas*, upon this statute, are in many respects similar to those which were before required by the statutes 51 Geo. III. c. 124. § 2. and 7 & 8 Geo. IV. c. 71. § 5. in cases where

the plaintiff proceeded by *original* or other writ, and summons or attachment thereupon, or by *subpoena* and attachment thereupon, in any action at law, against any person or persons not having privilege of parliament; as to which see *Tidd Prac.* 9 Ed. 113, 14, 155, 6.

^g Append. to Chap. IV, &c. § 16.

^h *Johnson v. Rouse*, 1 Crompt. & M. 26. 3 Tyr. Rep. 161. S. C.; and for cases determined on the above statutes, see *Tidd Prac.* 9 Ed. 115, 156. and *Scott v. Gould*, 4 Taunt. 156. *Turner v. Wall*, 5 Taunt. 520. *Down v. Crewe*, 1 Marsh. 267. *Anon. id.* 268. a. *Hannam v. Dietrichsen*, 5 Taunt. 853. *Watmore v. Bruce*, 8 Taunt. 57. *Anon. id.*

must state that there have been *three* attempts at least to serve the defendant with the writ of *summons*, by calling at his dwelling-house, or place of abode^a, if he has one; service at the office of an employer, in such case, not being deemed sufficient^b; that on each of the *first* two calls, deponent apprised the person whom he saw, of the nature of his business^c, and made an appointment to call again, for seeing the defendant^d; and that on the *last* call, (which must appear to have been *eight* days at least before the application to the court^e;) a copy of the writ was left at the defendant's residence^f: The answers given to the deponent, on the different applications, must be stated in the *affidavit*^g; and he must not only swear that he has not been able to serve defendant with a copy of the writ, but must state in his *affidavit* such circumstances as will satisfy the court, or a judge, that the defendant keeps out of

171. *France v. Stephens*, *id.* 693. 3 Moore, 23. S. C. 11 Moore, 371, 2. (a) *Turner v. Smith*, 1 Moore & P. 557. in the Common Pleas; and *Pitt v. Eldred*, 1 Crompt. & J. 147. 1 Tyr. Rep. 128. S. C. *Winstanley v. Edge*, 1 Crompt. & J. 381. 1 Tyr. Rep. 276. S. C. *Godkin v. Redgate*, 1 Crompt. & J. 401. 1 Tyr. Rep. 287. S. C. *Whitehorne v. Simone*, 1 Crompt. & J. 402. 1 Tyr. Rep. 293. S. C. *Dobell v. King*, 1 Tyr. Rep. 496. *Anon. id.* 498, 9. *Giles v. Burroughs*, 1 Price, N. R. 75. *Bowser v. Austen*, 2 Crompt. & J. 45. 2 Tyr. Rep. 164. *Anon.* 1 Price, N. R. 139. S. C. *Fisher v. Goodwin*, *id.* 167. 2 Crompt. & J. 94. 2 Tyr. Rep. 164. S. C. *Bennington v. Owen*, 2 Crompt. & J. 125. *Hoblyn v. Simpson*, 2 Tyr. Rep. 165. *Latchman v. Cross*, *id. ib.* *Anon. id. ib.* *Man. Ex. Append.* 15. and *Dax*, *Append.* 74, 5, in the Exchequer of Pleas.

^a *Anon.* 1 Dowl. Rep. 513. 5 Leg. Obs. 63. S. C. *K. B. Thomas v. Thomas*, 2 Moore & S. 730. C. P. *Johnson v. Rouse*, 1 Crompt. & M. 26. 3 Tyr. Rep. 161. 1 Dowl. Rep. 641. S.

C. Pagden v. Kelly, 1 Leg. Ex. N. S. 205. Excheq. *per Bayley*, B.

^b *Thomas v. Thomas*, 2 Moore & S. 730.

^c *Coett v. Willis*, 5 Leg. Obs. 144. *K. B. Johnson v. Rouse*, 1 Crompt. & M. 26. 3 Tyr. Rep. 161. 1 Dowl. Rep. 641. S. C. Excheq.

^d *Johnson v. Rouse*, 1 Crompt. & M. 26. 3 Tyr. Rep. 161. 1 Dowl. Rep. 641. S. C. *Atkins v. Lowther*, 5 Leg. Obs. 144. Excheq.; and see *Simpson v. Ld. Graves*, 6 Leg. Obs. 45. Excheq.

^e *Smith v. James*, 5 Leg. Obs. 143. *K. B. Brian v. Stretton*, 1 Crompt. & M. 74. 3 Tyr. Rep. 163. 1 Dowl. Rep. 642. S. C. *Atkins v. Lowther*, 5 Leg. Obs. 144. Excheq.

^f *Anon.* 1 Dowl. Rep. 513. 5 Leg. Obs. 63. S. C. *Coett v. Willis*, 5 Leg. Obs. 144. *K. B. Street v. Ld. Alvanley*, 1 Crompt. & M. 27. 3 Tyr. Rep. 162. 1 Dowl. Rep. 638. S. C. *Hill v. Mould*, 3 Tyr. Rep. 162. (a.) *Jones v. Green*, E. 3 W. IV. Excheq.

^g *Pagden v. Kelly*, 1 Leg. Ex. N. S. 205. Excheq. *per Bayley*, B.

CHAP. IV,
&c.

Irregularity in
form of affidavit,
no ground for
setting aside *distringas*.

Affidavit re-
quired, when de-
fendant's re-
sidence is un-
known.

When he is
abroad.

Rule, or order,
for *distringas*.

the way, to avoid being served^a. It must also be sworn, that the defendant has not appeared to the action, according to the exigency of the writ, and cannot be compelled to do so, without some more efficacious process^b. But though the court will not in general grant a *distringas*, except on an *affidavit* that a copy of the writ has been left at defendant's house, still it seems that the mere want of that averment in the *affidavit*, is not sufficient to enable the defendant to move to set aside the *distringas*, as being irregular^c.

When the residence of the defendant is unknown, endeavours must be made to serve him personally, before the *distringas* can be obtained^d; and grounds must be stated in the *affidavit*, to induce the court to believe, that he keeps out of the way to avoid being served with process. When the defendant is abroad, a *distringas* may be obtained, on a proper *affidavit*, either to compel his appearance, or for the purpose of proceeding to outlawry^e. Where the defendant is not abroad, a *distringas*, for the purpose of outlawry, will not, it seems, be granted^e; and where there is reason to believe that he is abroad, a *distringas* to compel an appearance, it is said, will not be allowed^e: One state of circumstances, or the other, must be made out^e. And where it was not clear, on the face of the *affidavit*, whether the defendant was in this country or abroad, the court put the plaintiff to make his election, as to the purpose for which he sought to obtain the *distringas*^e. The *affidavit* must also state, when the defendant is abroad, not only that he went thither, for the purpose of avoiding the demands of his creditors, but also satisfy the court, or a judge, by a statement of the circumstances, that he keeps out of the way to avoid being served^f.

If the court, or a judge, are satisfied by *affidavit*, that the defendant has not appeared to the action, and cannot be compelled to

^a Anon. 1 Dowl. Rep. 513. 5 Leg. Obs. 63. S. C. K. B. Johnson v. Rouse, 1 Crompt. & M. 26. 3 Tyr. Rep. 161. S. C. Simpson v. Ld. Graves, 5 Leg. Obs. 45. Waddington v. Palmer, *id.* 444. Excheq. Price v. Bower, *id.* 445. *per Bayley, B.*

^b Stat. 2 W. IV. c. 39. § 2.

^c Smith v. Macdonald, 1 Dowl. Rep. 688.

^d 1 Dowl. Rep. 555.

^e Fraser v. Case, 9 Bing. 464. 2 Moore & S. 720. 1 Dowl. Rep. 725. S. C.

^f Simpson v. Ld. Graves, 6 Leg. Obs. 45.

do so without some more efficacious process, they will make a rule^a, or order^b, for issuing the *distringas*, which is absolute in the first instance; and drawn up by the clerk of the rules in the King's Bench and Exchequer, or secondaries in the Common Pleas. But if the *affidavit* be insufficient, the plaintiff must sue out an *alias* or *pluries* writ of *summons*, for continuing the cause; which is sometimes done, when the first writ has not been personally served, to prevent the operation of the statute of limitations.

CHAP. IV,
&c.

The writ of *distringas* is issued on a proper *præcipe*^c; and is a *non omittas* writ, commanding the sheriff, that he omit not by reason of any liberty in his bailiwick, but that he enter the same, and distrain upon the goods and chattels of the defendant, for the sum of forty shillings, in order to compel his appearance in the court in which the action is brought, to answer the plaintiff, in a plea of trespass on the case, (or debt, &c., as the case may be,) and to make known to the court, how he shall execute the same, on the return day^d. In the county palatine of *Lancaster*, the writ of *distringas* is directed to the Chancellor or his deputy, or, in *Durham*, to the Bishop or his chancellor; commanding the former, that by writ under the seal of his county palatine to be duly made, and directed to the sheriff of the said county palatine, he command the said sheriff, (or, if in *Durham*, that the bishop or his chancellor, by writ under the seal of his bishoprick, to be duly made, and directed to the sheriff of the county of *Durham*, cause the said sheriff to be commanded,) that he omit not by reason of any liberty in his bailiwick, but that he enter the same, and distrain upon the goods and chattels, &c., (as before;) and how the said sheriff shall execute that writ, he make known, &c., on the return day^e. In every writ of *distringas*, issued under the authority of the act, it is

Form of *distringas*.

In county palatine.

No additional fee for *non omittas* clause, in *distringas*.

^a Append. to Chap. IV. &c. § 17.

^b *Id.* § 18.

^c *Id.* § 19.

^d Sched. to stat. 2 W. IV. c. 39. No. 3. Append. to Chap. IV. &c. § 20. For the writ of *distringas*, and proceedings thereon, before stat. 2 W. IV. c. 39, on a special *original* writ, in the King's Bench or Common Pleas, see Tidd *Prac.* 9 Ed. 110, 11; on a *capias quare clausum fregit*, in the Common Pleas, *id.* 111; on a *venire facias* and *subpoena*,

in the Exchequer, *id.* 155, 6; on stat. 7 & 8 Geo. IV. c. 71. § 5. *id.* 113, 14. 155, 6; in actions against peers, *id.* 119; members of the House of Commons, *id.* 116. 120; corporations, *id.* 121; hundredors, *id.* 123; inhabitants of county of city, or liberty, &c., *id.* 126; and respecting *issues*, on writs of *distringas*, *id.* 110, 11. 119. 155.

^e Append. to Chap. IV, &c. § 21. R. M. 3 W. IV. reg. 16. 2 Moore & S. 338. 9 Bing. 450, 51.

CHAP. IV,
&c.

To whom di-
rected.

In counties pa-
latine.

In *cinque ports*.

a rule^a, that "a *non omittas* clause may be introduced by the plaintiff, without the payment of any additional fee on that account." This writ should, in general, be directed to the sheriff of the county wherein the dwelling house or place of abode of the defendant is situate, or to the sheriff of any other county, or to any other officer to be named by the court, or a judge^b. And, if there are more sheriffs than one, the writs of *distringas* and *capias* should be directed accordingly^c; and if they are to a sheriff, or sheriffs, of a city or town and county of itself, they should be so described^d; or, if one of the sheriffs is a party, the writs should be directed to the other^e; or, if both the sheriffs are parties, to the coroner^f; and, if he also be a party, to *elisors* named by the master in the King's Bench^g, or *prothonotaries* in the Common Pleas^h.

The authority and jurisdiction of the Chamberlain, and Vice chamberlain of the county palatine of *Chester*, being abolished by the statute 11 Geo. IV. & 1 W. IV. c. 70. § 13ⁱ, the process of *distringas* and *capias*, &c. should be directed to the sheriff of that county. But there is a *proviso* in the statute 2 W. IV. c. 39^k, that "nothing therein contained shall abridge, alter, or affect the franchises and jurisdictions of either of the counties palatine of *Lancaster*, or *Durham*, or of any officer or minister thereof." If the defendant, therefore, reside in the county palatine of *Lancaster*, the writ should be directed to the *Chancellor*, or his deputy^l; or, if in *Durham*, to the *Bishop*, or his Chancellor: and the *mandatory* part of the writ is framed accordingly^m. In the *cinque ports*, the process

^a R. M. 3 W. IV. reg. 8. 2 Moore & S. 335. 9 Bing. 445.

^b Stat. 2 W. IV. c. 39. § 3. and see Sched. thereto, No. 3. Append. to Chap. IV, &c. §§ 22, &c. and see Wright v. Warren, 3 Moore & S. 164. per Alderson, J. *Ante*, 65. 71.

^c Stat. 2 W. IV. c. 39. § 3.

^d Append. to Chap. IV, &c. § 22, 3.

^e *Letson v. Bickley*, 5 Maule & S. 144.

^f *Weston v. Coulson*, 1 Blac. Rep. 506. — *v. Phillips*, E. 42 Geo. III. K. B. Append. to Chap. IV, &c. § 24.

^g *Grant v. Bagge*, 3 East, 141. Append. to Chap. IV, &c. § 25.

^h *Andrews v. Sharp*, 2 Blac. Rep. 911. Mayor, &c., of *Norwich v. Gill*, 1 Moore & S. 91. 8 Bing. 27. S. C.; but see Mayor, &c., of *Berwick upon Tweed v. Williams*, 10 Moore 266. and see *Tidd Prac.* 9 Ed. 151. Append. thereto, Chap. XIII. § 42, and Append. to Chap. IV, &c. § 25.

ⁱ 1 Sup. to *Tidd Prac.* 9 Ed. 24, 5.

^k § 21.

^l R. M. 3 W. IV. reg. 16. and see *Tidd Prac.* 9 Ed. 151. Append. thereto, Chap. VIII. § 26.

^m *Ante*, 81. Append. to Chap. IV, &c. § 21.

is directed to the *Constable of Dover* castle, his deputy or lieutenant^a; and in *Berwick upon Tweed*, to the mayor and bailiffs of *Berwick*^b. In the Isle of *Ely*, the process out of the courts at *Westminster* goes in the first instance to the sheriff of *Cambridgeshire*, who thereupon issues his mandate to the bailiff of the franchise^c: And, in like manner, where the defendant resides in the borough of *Southwark*, the process is directed to the sheriff of the county of *Surrey*, who issues his mandate thereupon to the bailiff of the borough, and not to the bailiff in the first instance^d. When any district or place, being parcel of one county, is wholly situate within and surrounded by another, the writ of *distringas*, or *capias*, may be directed to the sheriff of either county, to serve or execute the same within such district^e.

In *Berwick upon Tweed*.

In Isle of *Ely*, &c.

When parcel of one county is surrounded by another.

The writ of *distringas* must be *tested* in the name of the chief justice of the King's Bench or Common Pleas, or chief baron of the Exchequer; or, in case of a vacancy of such office, then in the name of a *senior puisne* judge of the court from which it issues^f: And "every such writ shall be made returnable on some day in term, not being less than *fifteen* days after the *teste* thereof, and shall bear *teste* on the day of the issuing thereof, whether in term or in vacation."^g But "no such writ shall be sufficient for the purpose of outlawry, or waiver, if the same be returned within less than *fifteen* days after the delivery thereof to the sheriff, or other officer to whom the same shall be directed."^h

Teste of distringas.

When returnable.

For proceeding to outlawry.

A notice is required to be subscribed to the writ of *distringas*ⁱ, which is addressed to the defendant, requiring him to take notice, that the sheriff has distrained upon his goods and chattels for the sum of *forty* shillings, in consequence of his not having appeared in court, to answer to the plaintiff, according to the exigency of the writ of *summons*; and that in default of his appearance to the

Notice to be subscribed to.

^a Append. to Chap. IV, &c. § 27.

^b *Id.* § 28.

^c *Grant v. Bagge*, 3 East, 128.

^d *Bowring v. Pritchard*, 14 East, 289. and see 1 Chit. R. 374. (*b.*) *Tidd Prac.* 9 Ed. 152.

^e For a direction to the sheriff of either county to execute a writ of *capias* in a particular district, see Append. to Chap. VII, &c. § 2. n.

^f Stat. 2 W. IV. c. 39. § 12.

^g Stat. 2 W. IV. c. 39. § 3. And for the manner in which the writ of *distringas* was made returnable, before the statute 2 W. IV. c. 39, on an original writ of trespass *quare clausum fregit* in the Common Pleas, see *Tidd Prac.* 9 Ed. 111.

^h Stat. 2 W. IV. c. 39. § 5.

ⁱ Sched. to Stat. 2 W. IV. c. 39. No. 1. Append. to Chap. IV, &c. § 29.

CHAP. IV,
&c.Indorsements
on.Issuing, sign-
ing, and sealing.Copy of writ and
notice to be de-
livered there-
with to sheriff,
&c.Warrant to dis-
train, &c.Sheriffs to name
deputies, resident
in London, for
receiving writs
and granting
warrants, &c.

writ of *distringas*, within *eight days inclusive* after the return thereof, the plaintiff will cause an appearance to be entered for him, and proceed thereon to judgment and execution^a; or (*if the defendant be subject to outlawry*), will cause proceedings to be taken to outlaw him^b. And the writ of *distringas* is to be indorsed with the name of the plaintiff, or his attorney, in like manner as the writ of *summons*^c; and the amount of the debt and costs claimed by the plaintiff, when the action is brought for the recovery of a *debt*, should, it seems, be indorsed thereon^c.

The writ of *distringas* is issued on a proper *præcipe*^d, and signed, and sealed, in like manner as the writ of *summons*. A true copy of every such writ, and notice, is required to be delivered therewith to the sheriff, or other officer, to whom such writ shall be directed^e; and he will grant a *warrant*^f thereon, for the execution of it; but, in a county palatine, a *mandate*^g must be previously obtained from the chancellor of the Duchy of *Lancaster*, or his deputy, or from the Bishop of *Durham* or his chancellor, commanding the sheriff, &c., to execute the writ.

By the statute 23 Hen. VI. c. 9. sheriffs are required to make yearly a deputy, in the king's courts of his Chancery, the King's Bench, Common Pleas, and Exchequer, of record, before they shall return any writs, to receive all manner of writs and warrants to be delivered to them; which statute was enforced by subsequent rules of court in the King's Bench^h, and Common Pleasⁱ: and accordingly, by the late act for the further amendment of the law^k, &c., it is enacted, that "from and after the 1st day of *June* 1833^l, "the sheriff of each county in *England* and *Wales* shall severally "name a sufficient deputy, who shall be resident, or have an office, "within *one mile* from the *Inner Temple Hall*, for the receipt of "writs, granting warrants thereon, making returns thereto, and

^a This notice is, so far, similar to that which was before required by the statutes 51 Geo. III. c. 124. § 2, and 7 & 8 Geo. IV. c. 71. § 5.

^b Sched. to stat. 2 W. IV. c. 39. No. 3. Append. to Chap. IV, &c. § 29.

^c *Ante*, 69.

^d Append. to Chap. IV, &c. § 19.

^e Stat. 2 W. IV. c. 39. § 3.

^f Append. to Chap. IV, &c. § 31; and as to the sheriff's warrant, see *Tidd Prac.*

9 Ed. 216, 17.

^g Append to Chap. IV, &c. § 32.

^h R. M. 1654. § 1. R. E. 15 *Car.* II. reg. 4. K. B.

ⁱ R. M. 1654. § 1. R. H. 14 & 15 *Car.* II. reg. 1. R. H. 15 & 16 *Car.* II. C. P.

^k Stat. 3 & 4 W. IV. c. 42. § 20.

^l This was a day after the bringing in of the bill, but before the passing of the act.

"accepting of all rules and orders, to be made on or touching the execution of any process or writ, to be directed to such sheriff."

CHAP. IV,
&c.

The sheriff having received the writ, and granted a warrant thereon, it is his duty, before the return thereof, to distrain upon the goods of the defendant, if he has any, for the sum of 40s., in order to compel his appearance; and also to serve the writ and notice, or a copy thereof, on the defendant, if he can be met with; or if not, to leave it for him, at the place where such *distringas* shall be executed ^a.

Duty of sheriff,
in executing *distringas*.

On the execution of the writ of *distringas*, the defendant should, within *eight days inclusive* after the return thereof, cause an appearance to be entered for him, in the court out of which the writ issued; or, in default thereof, the plaintiff may, by the terms of the *notice* subscribed to the writ ^b, cause an appearance to be entered for him, and proceed thereon to judgment and execution, (in like manner as when the writ of *summons* has been personally served on the defendant ^c;) or (if the defendant be subject to outlawry,) may cause proceedings to be taken to outlaw him. And where a sheriff has distrained on a defendant's goods, and the defendant does not appear, according to the exigency of the writ, the plaintiff, on an *affidavit* of the due execution thereof ^d, may enter an appearance for him, without leave of the court ^e. But "if such writ of *distringas* shall be returned *non est inventus* and *nulla bona* ^f, and the party suing out such writ shall not intend "to proceed to outlawry or waiver, according to the authority "thereinafter given, and any defendant, against whom such writ of *distringas* issued, shall not appear at or within *eight days inclusive* after the return thereof, and it shall be made appear by *affidavit* ^g, to the satisfaction of the court out of which such writ "of *distringas* issued, or, in vacation, of any judge of either of "the said courts, that due and proper means were taken and used

Proceedings on
execution of.

Appearance may
be entered by
plaintiff, without
leave of court.

Proceedings on
return of *non
est inventus*, and
nulla bona.

^a Stat. 2 W. IV. c. 39. § 3. and see Tidd *Prac.* 9 Ed. 114. as to the mode of serving the writ of *distringas*, on stat.

7 & 8 Geo. IV. c. 71. § 5.

^b Sched. to stat. 2 W. IV. c. 39. No. 3. Append. to Chap. IV, &c. § 29.

^c *Ante*, 76.

^d Append. Chap. XII. § 2.

^e Johnson v. Smealey, 1 Dowl. Rep. 526. 555.

^f Append. to Chap. IV, &c. § 34.

^g Append. to Chap. XII. § 3.; and for the rule of court thereon, for entering appearance, in term time, *id.* § 4. and judge's order in vacation, *id.* § 5.

CHAP. IV, "to serve and execute such writ of *distringas*, it shall be lawful
&c. "for such court, or judge, to authorize the party suing out such
"writ, to enter an appearance for such defendant, and to proceed
"thereon to judgment and execution."^a

Affidavit for authorizing plaintiff to enter appearance for defendant.

In order to obtain a rule of court, or order of a judge, for the plaintiff to be at liberty to enter an appearance for the defendant, an *affidavit*^b must be made, shewing that proper means were taken and used to serve and execute the writ of *distringas*; and that, from the facts stated therein, there is reason to believe that the defendant keeps out of the way, to avoid being served with process: And it seems that the court, or a judge, may look at the previous steps taken by the plaintiff, in order to entitle himself to a *distringas*^c. On a motion for leave to enter an appearance for the defendant, under the above clause, after return by the sheriff to the *distringas*, of *nulla bona* and *non est inventus*, it appeared by the *affidavit*, that the person endeavouring to serve the *distringas* had called several times at the residence of the defendant, who was a lodger, and had left a copy of the writ each time; and that he was told, the defendant was not within, and that there was nothing belonging to the defendant there, as his lodgings were let to him ready furnished; *Bayley*, B. was of opinion, that the *affidavit* ought to go on to state that the defendants had no effects elsewhere; and when that deficiency was supplied, the plaintiff would be at liberty to enter an appearance for the defendant^d. But where the *affidavit* stated that *three* attempts had been made to execute the *distringas*, at the defendant's then *present* or *late* place of abode; Lord *Lyndhurst*, C. B. ruled that it was insufficient, in not stating that endeavours had been made to serve the defendant, at his then *present* place of abode; and that it ought to have stated the grounds for believing that he could not be found^e.

Rule or order thereon.

If the court, or a judge, be satisfied with the *affidavit*, they will make a rule^f, or order^g, authorizing the plaintiff to enter an ap-

^a Stat. 2 W. IV. c. 39. § 3. And for the time and mode of appearance by the plaintiff, on stat. 7 & 8 Geo. IV. c. 71. § 5. see *Tidd Prac.* 9 Ed. 113, 14. 243. *Post*, Chap. XII.

^b *Append.* to Chap. IV, &c. § 36.

^c 1 Dowl. Rep. 555.

^d *Cornish v. King*, 6 Leg. Obs. 110. *per Bayley*, B.

^e *Scarborough v. Evans*, 6 Leg. Obs. 362. *Excheq.*

^f *Append.* to Chap. XII. § 4.

^g *Id.* § 5.

pearance for the defendant, which should be entered accordingly. But if the *affidavit* be insufficient, the plaintiff's only remedy is by suing out a writ of *exigi facias*, and proceeding thereon to outlaw the defendant, which will be noticed in the next chapter.

CHAP. IV,
&c.

CHAP. VII, VIII. X, XI.

Of the WRIT of CAPIAS, and the EXECUTION thereof; and PROCESS of OUTLAWRY.

THE writ of *capias* is founded on the statute 2 W. IV. c. 39. § 4. by which it is enacted, that "in all *personal* actions, wherein it is "intended to arrest and hold any person to special bail, who may "not be in the custody of the marshal of the marshalsea of the "court of King's Bench, or of the warden of the *Fleet* prison, the "process shall be by writ of *capias*, according to the form contained in the schedule annexed to that act, and marked No. 4."^a This writ lies against all persons who are subject to a *capias*, and may be arrested and held to special bail; but there is a *proviso* in the act^b, that "nothing therein contained shall subject any person "to arrest, who, by reason of any privilege, usage, or otherwise, "may now by law be exempt therefrom." The persons against whom a writ of *capias* does not lie are, not to mention the sove-

Writ of *capias*,
in what actions
it lies.

Against whom.

Persons privileged from
arrest.

Persons not
subject to a
capias.

^a Stat. 2 W. IV. c. 39. § 4. Append. to Chap. VII, &c. § 2. And as to the writ of *capias ad respondendum* by original, in the King's Bench or Common Pleas, before the statute, see Tidd *Prac.* 9 Ed. 128, &c.; bill of *Middlesex* and *latitat*, in the King's Bench, *id.* 146, 7; *capias quare clausum fregit*, in the Common Pleas, *id.* 153; and *quo minus*, in the Exchequer, *id.* 157. And for the

form of the writ of *capias ad respondendum* by original, in K. B. and C. P. see Append. to Tidd *Prac.* 9 Ed. Chap. VII, § 1.; of the bill of *Middlesex* and *latitat*, in K. B. *Id.* Chap. VIII. § 6. 11. 21. 28.; of the *capias quare clausum fregit*, in C. P. *id.* § 52. 54.; and of the *quo minus*, in the Exchequer, *id.* § 111.

^b Stat. 2 W. IV. c. 39. § 19.

CHAP. VII,
&c.Persons not
liable to be ar-
rested thereon.Persons having
a temporary or
local privilege
from arrest.

reign, *ambassadors*, or other public ministers^a; *peers* of the realm of *England*, and *peeresses*, whether by birth or marriage^b, and *Scotch* or *Irish* peers and peeresses^b; members of the House of *Commons*^b, or of *convocation*^c; members of *corporations* aggregate^c, or *hundredors*^c, for any thing done in their corporate capacity, or on the statute 7 & 8 Geo. IV. c. 31.; and *attornies*, or other officers of courts of justice^c. There are also other persons, who, though they were formerly subject to a *capias*, are not liable to be arrested thereon; as the servants in ordinary of the *King*, or *Queen* regent, without notice first given to, and leave obtained from the lord chamberlain of the royal household^d; *executors* and *administrators*, when they merely act *en auter droit*, and have duly administered the effects of the deceased^e; *heirs* and *devisees*, when sued on the bond or obligation of their ancestors, or devisors^e; *married women*, for debts contracted before or after coverture^f, unless, in the latter case, they have appeared and acted as *femes sole*, and obtained credit in that character, under false and fraudulent pretences^f; *seamen*^g, *marines*^g, and *soldiers*^g, for debts under a certain amount^h; *bankrupts*, in coming to surrender and finish their examinationⁱ; and, after they have obtained their certificates, for debts contracted prior to their bankruptcyⁱ; and *insolvent debtors*, discharged under the statute 7 Geo. IV. c. 57, for debts due at the time of filing their petitionsⁱ. It is also observable, that defendants have, in some cases, only a *temporary* or *local* privilege from arrest: Thus, the *parties* to a suit, and their *attornies*, *witnesses*, &c., are, for the sake of public justice, privileged from arrest, in coming to, attending upon, and returning from the courts; or, as it is usually termed,

^a Tidd *Prac.* 9 Ed. 191.^b *Id.* 192.^c *Id.* 193.^d *Id.* 190.^e *Id.* 193.^f *Id.* 194, 5.^g *Id.* 198, 9.

^h By the statute 32 Geo. III. c. 33. *petty officers* and *seamen* in his majesty's service, were privileged from arrest, for any sum under 20*l.* And, by the last annual *mutiny* act, (3 & 4 W. IV. c. 5.) § 3. no person enlisted as a *soldier* shall be liable to be taken out of his ma-

jesty's service, by any process or execution, other than for some criminal matter, unless an *affidavit* be made, that the original debt amounts to the value of *thirty* pounds at least, over and above all costs of suit: And there is a similar clause, with regard to persons enlisted into his majesty's service as *marines*, in the last annual *marine* act, (3 & 4 W. IV. c. 6.) § 3.

ⁱ Tidd *Prac.* 9 Ed. 200.^k *Id.* 204.^l *Id.* 213.

cundo, morando, et redeundo^a: *clergymen* also were privileged, in going to and returning from church, or performing divine service^b: and every person is privileged from arrest on *Sunday*, except in cases of treason, felony, or breach of the peace^c; and in his own house, provided the outer door be shut^d; or in the King's presence^d, or within the verge of his royal palace^d, except by an order from the board of green cloth, or unless the process issue out of the *palace court*^d; or in any place where the King's justices are actually sitting^d.

CHAP. VII,
&c.

The writ of *capias* is a *non omittas* writ, directed to the sheriff, or other officer or person by whom the same is to be executed, in like manner as the writ of *distringas*^e; commanding him, that he omit not by reason of any liberty in his bailiwick, but that he enter the same, and *take* the defendant, (*stating the place and county of his residence, or supposed residence,*) if he shall be found in his bailiwick, and him safely keep, until he shall have given the said sheriff, &c. bail^f, or made deposit with him^g, according to law, in an action on promises, (*or, of debt, &c.,*) at the suit of the plaintiff, or until the defendant shall by other lawful means be discharged from his custody^h; and that, on execution thereof, the said sheriff, &c. do deliver a copy thereof to the defendant^h: and requiring the defendant to take notice, that within *eight* days after the execution thereof on him, *inclusive* of the day of such execution, he should cause special bail to be put in for him, in the court where the action is brought, to the said action^h; and that, in default of his so doing, such proceedings may be had and taken, as are mentioned in the warning thereunder written, or indorsed thereon^h: And further commanding the said sheriff, &c. that immediately after the execution thereof, he do return the writ to the said court,

Direction, and
form of *capias*.

Notice to de-
fendant.

When to be re-
turned.

^a Tidd *Prac.* 9 Ed. 195.

^b *Id.* 219.

^c *Id.* 218.

^d *Id.* 219.

^e *Ante*, 78.

^f For the form of the bail bond, see Append. to Chap. VII, &c. § 11. And as to bail to the sheriff, and his duty to take the same, see Tidd *Prac.* 9 Ed. 221. 223.; and as to the bail-bond, in what sum it should be taken, the form of

it, and the consequences of its varying from the writ, &c., see *id.* 224, 5, 6.

^g As to the defendant's depositing money in the sheriff's hands, in lieu of finding sureties for his appearance at the return of the writ, on stat. 43 Geo. III. c. 46. § 2, see Tidd *Prac.* 9 Ed. 227; and for the construction of that statute, and the cases decided thereon, *id.* 228, 9.

^h Sched. to stat. 2 W. IV. c. 39. No. 4. Append. to Chap. VII, § 2, &c.

CHAP. VII, together with the manner in which he shall have executed the same, &c. and the day of the execution thereof; or that, if the same shall remain unexecuted, then that he do so return the same, at the expiration of *four* calendar months from the date thereof, or sooner, if he should be thereto required, by order of the said court, or by any judge thereof^a.

Writ of *capias*,
to county palatine.

The writ of *capias*, as well as the *distringas*, into the counties palatine of *Lancaster* and *Durham*, is required, by a general rule of all the courts^b, to be directed to the chancellor of the county palatine of *Lancaster*, or his deputy, or to the bishop of *Durham*, or his chancellor; and commands the former, that by his writ, under the seal of the said county palatine, to be duly made, and directed to the sheriff of the said county palatine, he command the said sheriff, (or, if in *Durham*, that the bishop, by his writ, under the seal of his bishoprick to be duly made, and directed to the sheriff of the county of *Durham*, cause the said sheriff to be commanded,) that he omit not by reason of any liberty in his bailiwick, but that he enter the same, and take the defendant, &c. (*as in common cases*): And that he further command him, that on execution thereof, he do deliver a copy thereof to the said defendant; and that the said writ do require the said defendant to take notice, &c.; and that he further command the said sheriff, that immediately after the execution thereof, he do return that writ, &c.^c (*as in the ordinary capias, with the like memorandum, warning, and indorsements.*)

Defendant's
names should
be inserted in
writ.

Initials of his
christian name,
when and how
stated.

By R. H. 2 W.
IV. reg. 1. § 32.

The christian and surnames of the defendant, if known, should be inserted in the writ: And where he was described in the process, and *affidavit* to hold to bail, by the *initials* of his christian name only, the courts would formerly have ordered the bail bond to be delivered up to be cancelled, and the defendant discharged, upon entering a common appearance^d. But, by a late rule of all the courts^e, "where the defendant is described in the process, or *affidavit* to hold to bail, by *initials*, or by a wrong name, or without a *christian* name, the defendant shall not be discharged out of custody, or the

^a Sched. to stat. 2 W. IV. c. 39. No. 4. Append. to Chap. VII, &c. § 2.

^b R. M. 3 W. IV. reg. 16. 2 Moore & S. 338. 9 Bing. 450, 51. *Ante*, 81.

^c Append. to Chap. VII, &c. § 3.

^d *Reynolds v. Hankin*, 4 Barn. & Ald.

536. and see *Parker v. Bent*, 2 Dowl. & R. 73. *McBeath v. Chatterley*, *id.* 237.

K. B. *Taylor v. Rutherford*, 6 Moore, 264. C. P.

^e R. H. 2 W. IV. reg. 1. § 32. 8

Bing. 202. 2 Sup. to Tidd *Prac.* 9 Ed. 12.

bail bond delivered up to be cancelled, on motion for that purpose, if it shall appear to the court, that due diligence has been used to obtain knowledge of the proper name." In the construction of this rule, due diligence was holden to have been used, in inquiring the name of a defendant, although no inquiries had been made of him, or his immediate friends, or at his house, or place of business; the debt being large, and the *affidavits* shewing that there was ground to fear he might abscond, if he knew that proceedings were about to be instituted^a. And now, by the late act for the further amendment of the law^b, &c. in "all actions upon bills of exchange or promissory notes, or other written instruments, any of the parties to which are designated by the *initial* letter or letters, or some contraction of the christian or first name or names, it shall be sufficient, in every *affidavit* to hold to bail, and in the process or declaration, to designate such person by the same *initial* letter or letters, or contraction of the christian or first name or names, instead of stating the christian or first name or names in full."

CHAP. VII,
&c.

By stat. 3 & 4
W. IV. c. 42.

The defendant's residence or place of abode should also be inserted in the writ of *capias*^c: And there is a rule of the court of King's Bench^d, that "the attorney concerned for the plaintiff in the cause, or his agent, shall, upon allailable mesne process, and every writ of attachment, and *feri facias*, and *capias ad satisfaciendum*, indorse the place of abode and addition of the party against whom the writ is issued, or such other description of him as such attorney or agent may be able to give." On this rule it has been determined, that a sheriff is not bound to executeailable process, in which the place of abode and addition of the defendant are not indorsed, although, at the time of receiving the *capias*, he made no objection to the want of such indorsement^e.

Defendant's residence, or place of abode.

The writ of *capias* must bear *date* on the day on which it is issued^f; which requisite, we have seen^g, is not satisfied by a day being *indorsed* on the writ^h; and it must be *tested* in the name of

Date and teste of writ.

^a Hicks v. Mareco, 1 Crompt. & M. 84. 3 Tyr. Rep. 216. S. C. Dowl. & R. 471. and see Tidd Proc. 9 Ed. 159.

^b 3 & 4 W. IV. c. 42. § 12. and see same statute, § 11, by which pleas of *misnomer* are abolished. *Ante*, 66.

^c *Ante*, 89. but see Webb v. Lawrence, 6 Leg. Obs. 461. Excheq.

^d R. H. 2 & 3 Geo. IV. K. B. 5 Barn. & Ald. 560. 2 Chit. R. 377. 1

^e Kenrick v. Nanney, 1 Dowl. Rep. 58. 2 Leg. Obs. 270. S. C. per Taunton, J.

^f Stat. 2 W. IV. c. 39. § 12.

^g *Ante*, 68.

^h Stat. 2 W. IV. c. 39. § 12.

CHAP. VII, the Lord Chief Justice, or Lord Chief Baron, of the court from
&c. which it issues; or, in case of a vacancy of such office, then in the
When to be re- name of a *senior puisne* judge of the said court^a. This writ is, by
turned. the terms of it^b, to be returned by the sheriff, &c. immediately
For proceeding after the execution thereof: But it "is not sufficient, for the pur-
to outlawry. "pose of outlawry, or waiver, if the same be returned within less
"than *fifteen* days after the delivery thereof to the sheriff, or other
"officer to whom the same shall be directed."^c

Memorandum
to be subscribed
to.

Warning to de-
fendant on.

A *memorandum* is required to be subscribed to the writ, stating that it is to be executed within *four* calendar months from the date thereof, including the day of such date, and not afterwards^d: And the following *warning*^e to the defendant must be thereunder written, or indorsed thereon. 1. If a defendant, being in custody, shall be detained on this writ, or if a defendant, being arrested thereon, shall go to prison for want of bail, the plaintiff may declare against any such defendant, before the end of the term next after such detainer or arrest, and proceed thereon to judgment and execution^f: 2. If a defendant, being arrested on this writ, shall have made a deposit of money, according to the statute 7 & 8 Geo. IV. c. 71., and shall omit to enter a common appearance to the action, the plaintiff will be at liberty to enter a common appearance for the defendant, and proceed thereon to judgment and execution^g: 3. If a defendant, having given bail on the arrest, shall omit to put in special bail, as required, the plaintiff may proceed against the sheriff, or on the bail bond^h: 4. If a defendant, having been served only with this writ, and not arrested thereon, shall not enter a common appearance within *eight* days after such service, the plaintiff may enter a common appearance for such defendant, and proceed thereon to judgment and executionⁱ. The sum for which the defendant is to be arrested and holden to special bail, by *affidavit* or judge's order, must also be indorsed on the writ^k; with the name and place of

Indorsements on.

^a Stat. 2 W. IV. c. 39. § 12.

^b Sched. to stat. 2 W. IV. c. 39. No. 4.

^c Stat. 2 W. IV. c. 39. § 5.

^d Sched. to stat. 2 W. IV. c. 39. No.

4. Append. to Chap. VII, &c. § 4.

^e Append. to Chap. VII, &c. § 5.

^f For the proceedings in actions against prisoners in custody of the sheriff, &c., see Tidd *Prac.* 9 Ed. 341, &c.,

and against those in custody of the marshal or warden, *post*, Chap. XV.

^g *Post*, Chap. XII.

^h *Post*, Chap. XIII.

ⁱ *Post*, Chap. XII.

^k Sched. to stat. 2 W. IV. c. 39. No.

4, 5. Append. to Chap. VII, &c. § 6. and see stat. 12 Geo. I. c. 29. § 2. This part of the statute, however, is

abode of the plaintiff, or his attorney, by whom the same was issued, and the amount of the debt and costs claimed by the plaintiff^a. It also seems, that the place of abode and addition of the party against whom the writ issues, or such other description of him as the plaintiff's attorney or agent may be able to give, should, at least in the King's Bench, be indorsed on the writ^b. And there is a clause in the act^c that "all such proceedings as are mentioned in any writ, notice, or warning, issued under that act, shall and may be had and taken, in default of the defendant's appearance or putting in special bail, as the case may be."

Proceedings in default of appearance, or special bail.

The writ of *capias* is issued by the proper officer; and signed, and sealed, in like manner as the writ of *summons*^d, or *distringas*^e: and, at the time of issuing it, the plaintiff's attorney, we have seen^f, should deliver to the officer by whom it is issued, a *præcipe*^g, or note of instructions, stating the county, nature of the writ, names of the parties, and cause of action, concisely, with the name of the plaintiff's attorney, and date. In bailable cases it is usual, at the time of issuing the writ, to make an *affidavit* of the cause of action. This *affidavit* may be sworn in court, or before a judge, or commissioner of the court, authorized to take *affidavits*, by virtue of the statute 29 Car. II. c. 5. or else before the officer who issues the process, or his deputy^h: and it may be sworn before a commissioner, although he be concerned as attorney for the plaintiffⁱ.

Issuing, signing and sealing.

Præcipe for.

Affidavit of cause of action.

Before whom sworn.

By the statute 29 Car. II. c. 5. § 2., (extended to the Isle of Man, by the statute 6 Geo. III. c. 50. § 2.) "the justices of the courts of King's Bench and Common Pleas, and the Lord Treasurer, Chancellor and Barons of the Exchequer, are authorized, by

Commissioners for taking affidavits, in England and Wales, &c.

merely *directory* to the sheriff, and does not avoid the process, when the sum sworn to is not indorsed upon it. Tidd *Prac.* 9 Ed. 159. 1st Supplement thereto, 65. Dorrington v. Bricknell, 11 Moore, 445. Martin (or Evans) v. Bidgood, 12 Moore, 236. 4 Bing. 63. S. C. As to the practice of holding the defendant to special bail, by order of a judge, see Tidd *Prac.* 9 Ed. 166; and for the forms of *affidavits* for that purpose, Append. thereto, Chap. X. § 86, 88.; and of the judge's order thereon, *id.* §

87.

^a *Ante*, 69. Append. to Chap. VII, &c. § 6, 7.

^b Append. to Chap. VII, &c. § 6.

^c Stat. 2 W. IV. c. 39. § 16.

^d *Ante*, 72.

^e *Ante*, 84.

^f *Ante*, 72, 3.

^g Append. to Chap. VII, &c. § 1.

^h Stat. 12 Geo. I. c. 29. § 2.

ⁱ R. E. 15 Geo. II. *reg.* 2. K. B. R. E. 13 Geo. II. *reg.* 1. C. P. and see Tidd *Prac.* 9 Ed. 179.

CHAP. VII, *commission*, to "empower as many persons as they shall think fit &c.

"and necessary, in the several shires and counties within the kingdom of *England*, and dominion of *Wales*, and town of *Berwick upon Tweed*, to take and receive all and every such *affidavit* and *affidavits* as any person or persons shall be willing and desirous to make, before any of the persons so empowered, in or concerning any cause, matter, or thing depending, or any wise concerning any of the proceedings, in the said respective courts, as masters extraordinary in chancery used to do." And, by a subsequent statute^a, the courts of law and equity in *Ireland*, are empowered to grant commissions for taking *affidavits*, in all parts of *Great Britain*^b: But a commission to take *affidavits* does not authorize the commissioner to administer an oath for the *vide* examination of a witness before an arbitrator^c. The commission for taking *affidavits* in *England* should, by the general stamp act^d, be stamped with a *ten* shilling stamp^d; and, by the statute 11 Geo. IV. & 1 W. IV. c. 43. § 4. "all commissions for taking *affidavits*, to be made use of and read in any court, shall, notwithstanding any demise of the crown, remain and continue in force, during the pleasure of the succeeding sovereign, until the same shall be revoked, or otherwise avoided."

In *Great Britain*, by courts in *Ireland*.

Authority given by.

Stamp duty on.

Not determined by demise of crown.

Authority of commissioners, in courts abolished by stat. 11 Geo. IV. & 1 W. IV. c. 70.

Power of granting commissions extended to *Scotland* and *Ireland*.

By the statute 11 Geo. IV. & 1 W. IV. c. 70. for the more effectual administration of justice in *England* and *Wales*^e, "any person who shall have been duly appointed a commissioner for taking *affidavits*, in any of the courts abolished by that act, shall, upon producing his appointment before the proper officer, and upon payment of *one shilling*, be entitled to have his name inserted in a list to be kept for that purpose, of such commissioners, and to exercise, within the limits of his existing commission, the same power and authority, and for the same purposes, as if his commission had issued from one of his majesty's courts at *Westminster*." And, by the late act for the further amendment of the law^f, &c., reciting that it would be convenient if the power of the superior courts of common law and equity at *Westminster*, to grant commissions for taking *affidavits*, to be used in the said courts respectively, should be extended; it is enacted, that

^a 55 Geo. III. c. 175.

^b Tidd *Prac.* 9 Ed. 179. (o.)

^c *Rex v. Hanks*, 3 Car. & P. 419. *per Gaselee, J.*

^d Stat. 55 Geo. III. c. 184. Sched.

Part II. § 3.

^e § 18. and see stat. 5 Geo. IV. c. 106. Tidd *Prac.* 9 Ed. 491. (l.)

^f 3 & 4 W. IV. c. 42. § 42.

"the Lord High-Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal, the said courts of law, and the several judges of the same, shall have such and the same powers for granting commissions, for taking and receiving *affidavits* in Scotland and Ireland, to be used and read in the said courts respectively, as they now have, in all and every the shires and counties within the kingdom of England, and dominion of Wales, and town of Berwick upon Tweed, and in the isle of Man, by virtue of the statutes now in force; and that all and every person and persons, wilfully swearing or affirming falsely, in any *affidavit* to be made before any person or persons who shall be so empowered to take *affidavits* under the authority aforesaid, shall be deemed guilty of perjury, and shall incur and be liable to the same pains and penalties, as if such person had wilfully sworn or affirmed falsely, in the open court in which such *affidavit* shall be entitled, and be liable to be prosecuted for such perjury, in any court of competent jurisdiction, in that part of the united kingdom in which such offence shall have been committed, or in that part of the united kingdom in which such person shall be apprehended on such a charge."

CHAP. VII,
&c.

The writ of *capias* being sued out, should be delivered to the sheriff, or other officer or person to whom it is directed; and "so many copies thereof should be delivered to him, together with every memorandum, or notice, subscribed thereto, and all indorsements thereon, as there may be persons intended to be arrested thereon, or served therewith:"^a And there is a *proviso* in the act, that "it shall be lawful for the plaintiff, or his attorney, to order the sheriff, or other officer or person to whom the writ shall be directed, to arrest one or more only of the defendants therein named, and to serve a copy thereof on one or more of the others^b; which order shall be duly obeyed by such sheriff, or other officer or person: and such service shall be of the same force and effect, as the service of the writ of *summons* therein before mentioned, and no other."^c

Delivery of
capias, with
copies thereof, to
sheriff, &c.

Plaintiff, or his
attorney, may
order sheriff, &c.
to arrest some
defendants, and
serve copy of
writ on others.

Upon the delivery of the writ to the sheriff, he will grant his warrant^d thereon, directed to his officers, for the execution

Warrant, or
mandate, on
capias.

^a Stat. 2 W. IV. c. 39. § 4.

^d Append. to Chap. VII, &c. § 8.

^b For the form of this order, see Append. to Chap. VII, &c. § 10.

And as to the sheriff's warrant to arrest the defendant, see Tidd *Prac.* 9 Ed. 217.

^c Stat. 2 W. IV. c. 39. § 4.

CHAP. VII, of it; but, in a county palatine, a *mandate*^a must be previously
&c. obtained from the Chancellor of the Duchy of *Lancaster* or his deputy, or from the Bishop of *Durham* or his chancellor, directed to the sheriff, commanding him to execute the same.

Duty of sheriff,
in executing.

Within the time limited for the execution of the writ, it is the duty of the sheriff, or his officers, to arrest the defendant^b, if he can be found in his bailiwick, and to detain him, until he shall have given him bail, or made deposit with him, according to law, or until the defendant shall, by other lawful means, be discharged from his custody^c. And there being, in divers parts of *England*, certain

When parcel of
one county is
surrounded by
another.

districts and places, parcel of some one county, but wholly situate within and surrounded by some other county, which was productive of inconvenience and delay in the service and execution of the process of the said courts; for remedy thereof it is enacted, that "every such district and place shall and may, for the purpose " of the service and execution of every writ and process, whether " *mesne* or *judicial*^d, issued out of either of the said courts, be " deemed and taken to be part as well of the county wherein such " district or place is so situate as aforesaid, as of the county " whereof the same is parcel; and every such writ and process " may be directed accordingly, and executed in either of such " counties."^e

Delivery of
copies of writ,
&c. to defend-
ants.

When the defendant is arrested upon the writ of *capias*, the sheriff, or his officer, is required by the statute^f, "upon or forthwith " after the execution thereof, to cause a copy of the writ, together " with every *memorandum* or notice subscribed thereto, and all in- " dorsements thereon, to be delivered to every person upon whom " such process shall be executed by him, whether by service or " arrest; and shall indorse on such writ, the true day of the exe-

Indorsement on
writ, of true day
of execution.

^a Append. to Chap. VII, &c. § 9.

^b As to the arrest of the defendant, and by whom, and by what authority, when, where, and in what manner, it may be made, see *Tidd Prac.* 9 Ed. 171. 216, &c.; and for the sheriff's duty on the arrest, *id.* 226, &c.

^c Sched. to stat. 2 W. IV. c. 39. No. 4.

^d The process usually put in opposition to *mesne* is *final*; *mesne* process being of a *judicial* nature, as well as process of execution: but the term *judicial*, in this clause, was probably intended to mean process after judgment.

^e Stat. 2 W. IV. c. 39. § 20.

^f 2 W. IV. c. 39. § 4.

"cution thereof, whether by service or arrest."^a In order to give effect to the last-mentioned provision, there is a general rule of all the courts^b, that "the sheriff, or other officer or person to whom any writ of *capias* shall be directed, or who shall have the execution and return thereof, shall, within six days at the least after the execution thereof, whether by service or arrest, indorse on such writ, the true day of the execution thereof; and in default thereof, shall be liable, in a summary way, to make such compensation for any damage which may result from his neglect, as the court or a judge shall direct." When the sheriff has neglected to comply with this rule, by not indorsing on the writ of *capias* the day of its execution, the plaintiff's remedy is, not by attachment, but by a rule calling on the sheriff to shew cause, why he should not amend his return, and make such compensation to the plaintiff, as the court shall direct; and why he should not pay the costs of the application^c: And he is commanded by the writ, immediately after the execution thereof, to return the same to the court, together with the manner in which he shall have executed it, and the day of the execution thereof; or that, if the same shall remain unexecuted, then that he do so return the same, at the expiration of four calendar months from the date thereof, or sooner, if he should be thereto required by order of the said court, or by any judge thereof^d.

When to be made, and consequence of omission.

Return of writ.

The defendant being arrested on the *capias*, is either discharged out of custody, on giving bail to the sheriff^e, or an attorney's undertaking for his appearance, according to the exigency of the writ^f, or on depositing in the sheriff's hands, the sum indorsed thereon, together with 10*l*. in addition, to answer costs, &c. on the statute 43 Geo. III. c. 46. § 2^g; or he remains in custody^h, or escapesⁱ, or is rescued^k, &c.

Proceedings on arrest.

^a Stat. 2 W. IV. c. 39. § 4. Append. to Chap. VII. &c. § 12.

^b R. M. 3 W. IV. reg. 4. 2 Moore & S. 330. 9 Bing. 444.

^c Ridley v. Weston, 2 Moore & S. 724.

^d Sched. to stat. 2 W. IV. c. 39. No. 4. Append. to Chap. VII. &c. § 2.

^e As to the bail to the sheriff, &c., vide ante, 89. (f.)

^f As to the nature and effect of an at-

torney's undertaking to appear, see Tidd Prac. 9 Ed. 227.

^g For this statute, and the proceedings thereon, see Tidd Prac. 9 Ed. 227.

^h For the proceedings, when defendant remains in custody, see id. 229.

ⁱ As to the defendant's escape, and the plaintiff's remedies thereon, see id. 235, &c.

^k For the plaintiff's remedies on a rescue, see id. 236, 7.

Proceedings,
when defendant
cannot be ar-
rested.

If the defendant cannot be taken on the writ of *capias*, the sheriff, on being required to return it, by order of the court or a judge, should return *non est inventus*^a; and thereupon, the plaintiff may either sue out an *alias*, and afterwards, if necessary, a *pluries capias*, for arresting the defendant, or issue an *exigi facias*, and proceed to outlawry. There is a clause in the act^b, however, that "nothing therein contained shall subject any person to outlawry, or waiver, who, by reason of any privilege, usage, or otherwise, may now by law be exempt therefrom."

*Alias and plu-
ries capias.*

The writs of *alias* and *pluries capias* are *non omittas writs*, directed to the sheriff, or other officer by whom they are to be executed; commanding him, (as *before*, or *theretofore*, he had been commanded,) to take the defendant, &c. (as in the first writ of *capias*):

May be directed
to sheriff of
another county.

And, by a general rule of all the courts^c, "any *alias* or *pluries* writ of *capias* may be directed to the sheriff of any other county; the plaintiff, in such case, referring to the preceding writ or writs, as directed to the sheriff to whom they were in fact directed^d.

Forms of.

The forms of these writs are given in the rule^e, and will be found in the *Appendix*^f: and there should be the like *memorandum*,

How issued, &c.

warning, and indorsements thereon, as on the first writ. These writs are issued, on proper *præcipes*^g; and signed, sealed, and executed, in like manner as the first writ of *capias*. But it has been determined, that if a writ of *capias* be issued, on an *affidavit* of debt, into one county, and no proceeding be taken thereon, the plaintiff need not issue an *alias capias*; but another *original* writ of *capias* may be issued into another county, on the same *affidavit*^h.

Alias capias un-
necessary, when
plaintiff does not
proceed on first
writ.

Proceedings to
outlawry, or
waiver, on mesne
process.

The writ of *exigi facias*, and process of outlawry, are founded on the statute 2 W. IV. c. 39ⁱ; by which it is enacted, that "upon the return of *non est inventus*, as to any defendant against whom such writ of *capias* shall have been issued, and also upon the return of *non est inventus* and *nulla bona*, as to any defendant against whom such writ of *distringas* as thereinbefore mentioned shall

^a Append. to Chap. XIII, § 14.

^b Stat. 2 W. IV. c. 39. § 19. And as to the exemption from outlawry or waiver, see Tidd *Prac.* 9 Ed. 131.

^c R. M. 3 W. IV. reg. 6. 9 Bing. 444. 2 Moore & S. 330, 31. By this rule it appears, that the *alias* and *pluries capias* are made to answer the purpose of

testatum writs.

^d Append. to Chap. VII, &c. § 15.

^e R. M. 3 W. IV. reg. 7. 9 Bing. 445.

^f Append. to Chap. VII, &c. § 14.

^g *Id.* § 13.

^h Rodwell v. Chapman, 1 Crompt. & M. 70. 1 Dowl. Rep. 634. S. C.

ⁱ § 5.

" have issued, whether such writ of *capias* or *distringas* shall have
 " issued against such defendant only, or against such defendant
 " and any other person or persons, it shall be lawful, until other-
 " wise provided for, to proceed to outlaw or waive such defendant,
 " by writs of *exigi facias*^a, and proclamation^b, and otherwise, in
 " such and the same manner as may now be lawfully done upon
 " the return of *non est inventus* to a *pluries* writ of *capias ad re-*
 " *spondendum*, issued after an original writ^c: Provided always,
 " that every such writ of *exigent*, proclamation, and other writ
 " subsequent to the writ of *capias* or *distringas*, shall be made re-
 " turnable on a day certain in term; and every such first writ of
 " *exigent* and proclamation shall bear *teste* on the day of the re-
 " turn of the writ of *capias*^d, or *distringas*, whether such writ be
 " returned in term or in vacation; and every subsequent writ of
 " *exigent* and proclamation shall bear *teste* on the day of the re-
 " turn of the next preceding writ^e: and no such writ of *capias* or
 " *distringas* shall be sufficient, for the purpose of outlawry or
 " waiver, if the same be returned within less than *fifteen* days
 " after the delivery thereof to the sheriff, or other officer to whom
 " the same shall be directed."^f

CHAP. VII,
&c.

*Teste and return
of writs of exi-
gent, and pro-
clamation, &c.*

" After judgment given in any action commenced by writ of
 " *summons* or *capias*, under the authority of that act, proceedings
 " to outlawry or waiver may be had and taken, and judgment of
 " outlawry or waiver given, in such manner, and in such cases, as
 " may now be lawfully done after judgment, in an action com-
 " menced by *original* writ^g: Provided always, that every outlawry,
 " Vacating, or set-
 " ting aside.

Outlawry, or
waiver, after
judgment.

^a Append. to Chap. VII, &c. § 17.

^b *Id.* § 19.

^c For the mode of proceeding to out-
lawry, or waiver, on an *original* writ, be-
fore the statute 2 W. IV. c. 39, see Tidd
Prac. 9 Ed. 130, &c.

^d The writ of *capias* not being return-
able on any particular day, the first writ
of *exigent* and proclamation, must, it
seems, bear *teste* on the day on which the
sheriff makes his return, to the writ of
capias.

^e For the *teste* and return of writs of
exigi facias, and proclamation, &c., before
the statute 2 W. IV. c. 39, see Tidd *Prac.*

9 Ed. 132, 3.

^f Stat. 2 W. IV. c. 39. § 5. And for
the *teste* and *return* of process by *ori-*
ginal, before the statute 2 W. IV. c. 39,
see Tidd *Prac.* 9 Ed. 107. 129, 30; in
actions against peers, &c., *id.* 118; by
bill, against members of the House of
Commons, *id.* 120, 21; of the bill of
Middlesex or *latuit*, &c. *id.* 151, &c.; of
the *capias quare clausum fregit*, in the
Common Pleas, *id.* 153; and of process
in the Exchequer, *id.* 157.

^g For the mode of proceeding to out-
lawry after judgment, see Tidd *Prac.* 9
Ed. 181. 1028. And for the forms of a

CHAP. VII, " or waiver, had under the authority of that act, shall and may be
&c. " vacated or set aside, by writ of error or motion, in like manner
" as outlawry or waiver, founded on an *original* writ, may now be
" vacated or set aside."^a

In Exchequer. In the Exchequer, the defendant could not formerly have been
outlawed; as the plaintiff could not proceed therein by *original*
writ^b: but this may now be done, by the statute 2 W. IV. c. 39.

Filazer, &c. by § 5. And, " for the purpose of proceeding to outlawry and
whom appointed. " waiver upon writs of *capias* or *distringas*, returnable in the
" court of Exchequer, it shall and may be lawful for the Lord
" Chief Baron of the said court, and he is thereby required, to
" appoint from time to time a fit person, holding some other office
" in the said court, to execute the duties of a *filazer*, *exigenter*, and
" clerk of the *outlawries*, in the same court."^c

Proceedings
may be had on
writs, except at
certain times, in
term or vacation.

Before the making of the statute 2 W. IV. c. 39. no proceed-
ing could have been effectually had in certain cases, on any writ
returnable within *four* days of the end of any term, until the be-
ginning of the ensuing term, whereby an unnecessary delay was
sometimes created; for remedy whereof, it is enacted by the above
statute^d, that " if any writ of *summons*, *capias*, or *detainer*, issued
" by authority of that act, shall be served or executed on any day,
" whether in term or vacation, all necessary proceedings to judg-
" ment and execution may, except as hereinafter provided, be had
" thereon, without delay, at the expiration of *eight* days from the
" service or execution thereof, on whatever day the last of such
" *eight* days may happen to fall, whether in term or vacation:
" Provided always, that if the last of such *eight* days shall in any
" case happen to fall on a *Sunday*, *Christmas* day, or any day ap-
" pointed for a public fast or thanksgiving, in either of such cases
" the following day shall be considered as the last of such *eight*

Proviso for
Sunday, &c.

præcipe for, and writ of *exigi facias* for
that purpose, see Append. to Chap. VII,
&c. §§ 16, 17.

^a Stat. 2 W. IV. c. 39. § 6. And for
the manner of reversing an outlawry, by
writ of error or motion, see Tidd *Prac.* 9
Ed. 138, &c.

^b Horton v. Peake, 1 Price, 309.

Tidd *Prac.* 9 Ed. 38. 132.

^c Stat. 2 W. IV. c. 39. § 7. And as
to the present and future appointment of
filazer, and clerk of the *errors*, in the court
of Exchequer, see stat. 2 & 3 W. IV. c.
110. §§ 1. & 9. *Ante*, 55.

^d § 11. and see 2 Rep. C. L. Com.
37. 81.

"days; and if the last of such *eight* days shall happen to fall on
 "any day between the *Thursday* before, and the *Wednesday* after
 "*Easter* day, then, in every such case, the *Wednesday* after *Easter*
 "day shall be considered as the last of such *eight* days": Pro-
 "vided also, that if such writ shall be served or executed on any
 "day between the *tenth* day of *August*, and the *twenty-fourth* day
 "of *October*, in any year, special bail may be put in by the de-
 "fendant, in bailable process, or appearance entered, either by the
 "defendant or the plaintiff, on process not bailable, at the expi-
 "ration of such *eight* days: Provided also, that no declaration, or
 "pleading after declaration, shall be filed or delivered between the
 "said *tenth* day of *August*, and *twenty-fourth* day of *October*."^a

CHAP. VII,
 &c.

For period be-
 tween 10th *Au-*
gust and 24th
October.

And, by a general rule of all the courts^b, "in case the time for
 pleading to any declaration, or for answering any pleading, shall
 not have expired before the *tenth* day of *August* in any year, the
 party called upon to plead, reply, &c. shall have the same number
 of days for that purpose, after the 24th day of *October*, as if the
 declaration, or preceding pleading, had been delivered or filed on
 the 24th day of *October*; but in such cases, it shall not be neces-
 sary to have a second rule to plead, reply, &c."

Time for plead-
 ing, &c. when it
 does not expire
 before 10th *Au-*
gust.

^a Stat. 2 W. IV. c. 39. § 11.

& S. 336. 9 Bing. 446.

^b R. M. 3 W. IV. reg. 12. 2 Moore

CHAP. XII.

Of APPEARANCE, and SPECIAL BAIL.

Appearance,
what.
How it differed
from bail.

Time formerly
allowed for
entering, in
actions by *original*, in K. B.
In C. P.

By R. H. 2 W.
IV. *reg.* 1.
§ 31.

Time allowed
for filing com-
mon bail, in
actions by *bill*,
in K. B.

Appearance, or
common bail, by
plaintiff, on stat.
12 Geo. I. c.
29.

APPEARANCE is the first act of the defendant in court^a; and differed from putting in *bail*, which was the act of the court itself^b, as is evident from the language of the bail-piece in the King's Bench, wherein the defendant was stated to be *delivered* to bail^c, &c. In actions by *original*, in the King's Bench, the defendant must formerly have entered his appearance, upon a *summons*, *attachment*, or *distringas*, on or before the *quarto die post* of the return of the writ^d. So, in the Common Pleas, the appearance must have been entered within *four* days after the return, which were reckoned *inclusive* both of the return day and the *quarto die post*^e. But, by a late rule of all the courts^f, "a defendant who had been served with process by *original*, must have entered an appearance within *four* days of the appearance day, if the action were brought in *London* or *Middlesex*, or within *eight* days of the appearance day, in other cases; otherwise the plaintiff might have entered an appearance for him, according to the statute; and any attorney who undertook to appear, must have entered an appearance accordingly." In actions by *bill*, in the King's Bench, where the defendant had been served with a copy of a bill of *Middlesex*, &c. he must formerly have filed common bail at the return of it, or within *eight* days after such return^g, which were reckoned *exclusively*; and *Sunday* was not accounted as one of them, if it happened to be the last^h.

Before the statute 12 Geo. I. c. 29, common bail could only have been filed, or a common appearance entered, by the *defend-*

^a Com. Dig. tit. *Pleader*, B. 1.

^b Stroud v. Lady Gerrard, 1 Salk. 8.

^c *Ex parte* Gibbons, 1 Atk. 239.

and see Tidd *Prac.* 9 Ed. 238.

^d Trye, *just. fil.* 67, 8.

^e Fano v. Coken, 1 H. Blac. 9.

^f R. H. 2 W. IV. *reg.* 1. § 31. 8

Bing. 292. and see 2d Sup. to Tidd *Prac.*

9 Ed. 19.

^g Stat. 5 Geo. II. c. 27. § 1.

^h Shadwell v. Angel, 1 Bur. 56. and see Tidd *Prac.* 9 Ed. 240.

ant, or his attorney: But, by that statute ^a, as altered by the 5 Geo. II. c. 27, "if the defendant having been served with process, did not appear at the return thereof, or within *eight* days after such return, the plaintiff, upon *affidavit* of the service of such process, made before a judge, or commissioner of the court for taking *affidavits*, or before the proper officer for entering common appearances, or his deputy, might have entered a common appearance, or filed common bail for the defendant, and proceeded thereon, as if such defendant had entered his appearance, or filed common bail." *Original* writs, however, having been abolished by the statute 2 W. IV. c. 39.^b, and there being no longer any distinction between proceedings by *original* writ and by *bill*^b, the time and mode of appearance to serviceable process are now regulated by that statute, and the forms of writs of *summons* and *distringas*, &c. in the *schedule* annexed thereto: and they are entered, either by the *defendant* or his attorney, or, in their default, by the *plaintiff* or his attorney.

Time and mode of appearance now regulated by stat. 2 W. IV. c. 39, &c.

When the defendant, in ordinary cases, has been personally served with the writ of *summons*, he is commanded thereby, within *eight* days *inclusive* after such service, to cause an appearance to be entered for him, in the court out of which the writ issued; or, in default of his so doing, the plaintiff may, by the terms of the writ ^c, cause an appearance to be entered for him, and proceed therein to judgment and execution. For this purpose, an *affidavit* should be made of the service of the writ ^d, though it is not expressly required by the statute. And when the plaintiff proceeds by writ of *summons* against a member of parliament, to enforce the provisions of the statute 6 Geo. IV. c. 16. § 10. the defendant is commanded by the writ, that within *one* calendar month next after personal service thereof on him, he do cause an appearance to be entered for him, in the court wherein he is sued ^e.

On service of writ of summons, appearance to be entered by defendant.

Or, in default thereof, by plaintiff.

Affidavit of service of writ.

In action against member of parliament.

On the execution of the writ of *distringas*, the defendant should, within *eight* days *inclusive* after the return thereof, cause an ap-

On execution of *distringas*, appearance to be entered by defendant.

^a § 1.

^b *Ante*, 61.

^c Sched. to stat. 2 W. IV. c. 39. No. 1. Append. to Chap. IV, &c. § 2.

^d Append. to Chap. XII. § 1. And as to the affidavit of the service of pro-

cess, before stat. 2 W. IV. c. 39, see *Tidd Prac.* 9 Ed. 114. 241, 2. And for the form of the affidavit of such service, see Append. thereto, Chap. V. § 29. Chap. XII. § 4.

^e *Ante*, 75.

Or, in default thereof, by plaintiff.

May be entered by plaintiff, without leave of court.

Proceedings on return of *non est inventus*, and *nulla bona*.

Affidavit for authorizing plaintiff to enter appearance.

Entering appearance, when one of several defendants only has been served with *capias*.

pearance to be entered for him, in the court out of which the writ issued; or, in default thereof, the plaintiff may, by the terms of the *notice* subscribed to the writ ^a, cause an appearance to be entered for him, and proceed thereon to judgment and execution, in like manner as when the writ of *summons* has been personally served on the defendant ^b; or (*if the defendant be subject to outlawry*), may cause proceedings to be taken to outlaw him ^c. And where a sheriff has distrained on a defendant's goods, and the defendant does not appear according to the exigency of the writ, the plaintiff, we have seen ^c, on an *affidavit* of the due execution of the writ ^d, may enter an appearance for him, without leave of the court ^e. But "if such writ of *distringas* shall be returned *non est inventus* and *nulla bona* ^f, and the party suing out such writ shall not intend to proceed to outlawry or waiver, according to the authority thereafter given, and any defendant against whom such writ of *distringas* issued, shall not appear at or within eight days inclusive after the return thereof, and it shall be made appear by *affidavit* ^g, to the satisfaction of the court out of which such writ of *distringas* issued, or, in vacation, of any judge of either of the said courts, that due and proper means were taken and used to serve and execute such writ of *distringas*, it shall be lawful for such court, or judge, to authorize the party suing out such writ, to enter an appearance for such defendant, and to proceed thereon to judgment and execution."^h

When there are several defendants, and one of them only has been served with a copy of the *capias*, and not arrested thereon, if the latter defendant does not enter a common appearance within eight days after such service, the plaintiff, on an *affidavit* of such service ⁱ, may enter a common appearance for him, and proceed thereon to judgment and execution ^k. And when the attorney,

^a Sched. to stat. 2 W. IV. c. 39. No. 3. Append. to Chap. IV, &c. § 29.

^b *Ante*, 76.

^c *Ante*, 85.

^d Append. to Chap. XII. § 2.

^e Johnson v. Smealey, 1 Dowl. Rep. 526. 555.

^f Append. to Chap. XIII. § 9.

^g Append. to Chap. XII. § 3. and for the rule of court thereon for entering

an appearance in term time, *id.* § 4. and judge's order in vacation, *id.* § 5.

^h Stat. 2 W. IV. c. 39. § 3. And for the time and mode of appearance by the plaintiff, on stat. 7 & 8 Geo. IV. c. 71. § 5. see Tidd *Prac.* 9 Ed. 113, 14. 243. *Post*, 105, 6. (g.)

ⁱ Append. to Chap. XII. § 6.

^k Sched. to stat. 2 W. IV. c. 39. No. 4. Append. to Chap. VII, &c., § 5.

whose name is indorsed on the writ, as having sued out the same, declares that it was not issued by him, or with his authority, the court or a judge, we have seen^a, may, if it shall appear reasonable so to do, make an order for the immediate discharge of the defendant, who may have been arrested thereon, on entering a common appearance^b. By the statute 43 Geo. III. c. 46^c, when the defendant, on being arrested, is discharged out of custody, on depositing money in the sheriff's hands, in lieu of finding sureties for his appearance at the return of the writ, the plaintiff is authorized, in case the defendant shall not put in and perfect special bail in the action, to enter a common appearance for the defendant, if the plaintiff shall so think fit. And, by the statute 7 & 8 Geo. IV. c. 71.^d when the defendant, instead of putting in and perfecting special bail, deposits and pays into court the sum indorsed upon the writ, together with an additional sum, as a security for costs, to abide the event of the suit, he is required to enter a common appearance, within such time as he would have been required to have put in and perfected special bail in the action, according to the course of the court; or, in default thereof, the plaintiff is empowered to enter such common appearance for the defendant, and the cause may proceed, as if the defendant had put in and perfected special bail.

When defendant is discharged, on declaration of attorney, that writ was not issued by him, &c.

After depositing money in sheriff's hands.

After paying money into court, in lieu of special bail.

The mode of appearance to the writ of *summons* &c., is pointed out by the statute 2 W. IV. c. 39^e; and declared to be, "by delivering a *memorandum* in writing, according to the form contained in the schedule annexed thereto, marked No. 2^f; such *memorandum* to be delivered to such officer or person as the court "out of which the process issued shall direct, and to be dated on "the day of the delivery thereof." For entering an appearance,

Mode of appearance.

Fees for entering appearance.

^a *Ante*, 70.

^b Stat. 2 W. IV. c. 39. § 17.

^c § 2. And for the proceedings on this statute, see *Tidd Prac.* 9 Ed. 227, 8.

^d § 2. Sched. to stat. 2 W. IV. c. 39. No. 4. Append. to Chap. VII, &c. § 5. And for the mode of proceeding on 7 & 8 Geo. IV. c. 71, see *Tidd Prac.* 9 Ed. 244, 5. 1st Supplement thereto, 78.

^e § 2.

^f Append. to Chap. XII. § 7, 8, 9,

10. And see further, as to the time and mode of *appearance* by the *defendant* or his attorney, before the statute 2 W. IV. c. 39, on a special original writ, in the King's Bench or Common Pleas, *Tidd Prac.* 9 Ed. 110. 238; on stat. 7 & 8 Geo. IV. c. 71. *id.* 118, 14; in actions against peers, *id.* 119; members of the House of Commons, *id.* 120; or on common process against the person, by stat. 12 Geo. I. c.

CHAP. XII. a fee of *one* shilling is allowed, by rule of court^a, for every defendant, unless an appearance shall be entered for more than one defendant, by the same attorney; and in that case, a fee of *four* pence for every additional defendant.

Proceedings on arrest.

The defendant, we have seen^b, being arrested on the writ of *capias*, is either discharged out of custody, on giving bail to the sheriff, or an attorney's undertaking for his appearance, according to the exigency of the writ, or on depositing in the sheriff's hands, the sum indorsed thereon, together with 10*l.* in addition, to answer costs, &c. on the statute 43 Geo. III. c. 46. § 2; or he remains in custody, or escapes, or is rescued, &c. If the defendant be discharged out of custody, on giving bail to the sheriff, he should, within *eight* days after the execution of the writ on him, *inclusive* of the day of such execution, cause special bail to be put in for him to the action, in the court in which it is brought; or, in default of his so doing, such proceedings may be had and taken as are mentioned in the warning thereunder written, or indorsed thereon^c.

Time for putting in special bail.

29. *id.* 240; and by the *plaintiff* or his attorney, on same statute, *id.* 241, 2; on stat. 43 Geo. III. c. 46. § 2. *id.* 228. 243, 4; on stat. 45 Geo. III. c. 124. *id.* 120, 21. 243; on stat. 51 Geo. III. c. 124. *id.* 113, 14. 243; on stat. 7 & 8 Geo. IV. c. 71. § 2. *id.* 228. 243, 4; on same statute, § 5. *id.* 113, 14. 243; and on the annual *mutiny* and *marine* acts, *id.* 243. It is not stated in the statute 2 W. IV. c. 39, with what officer the appearance is to be entered; but it seems to have been previously entered with the *filaxer*, in actions by *original* writ, in the King's Bench or Common Pleas, Tidd *Prac.* 9 Ed. 110; or against peers, *id.* 119; with the clerk of the common bails,

by *bill* against members of the House of Commons, *id.* 120; or, on common process against the person, in the King's Bench, *id.* 240; and, in the Exchequer, in the appearance book, in the office of pleas, *id.* 120. In the latter court, it is now entered with the *filaxer*.

^a R. M. 3 W. IV. *reg.* 2. 2 Moore & S. 329. 9 Bing. 443.

^b *Ante*, 97.

^c Sched. to stat. 2 W. IV. c. 39. No. 4. And for the nature of special bail, and by whom, when, and how put in and perfected, see Tidd *Prac.* 9 Ed. 244, &c.; and for the late rules respecting such bail, see 2d Supplement thereto, p. 20, &c.

CHAP. XIII.

Of PROCEEDINGS against the SHERIFF, to compel him to RETURN the WRIT, and bring in the BODY.

THE writ of *summons*, we have seen^a, must be returned by the plaintiff or his attorney; but the writ of *distringas* and *capias* are to be returned by the sheriff, or other officer to whom they are directed; and the writ of *detainer*, by the marshal of the King's Bench, or warden of the *Fleet* prison.

Writ of summons, &c. by whom to be returned.

The writ of *distringas* should regularly be returned by the sheriff, on the day on which it is made returnable^b; and the writ of *capias*, immediately after the execution thereof^c; or, if the same shall remain unexecuted, then at the expiration of *four* calendar months from the date thereof, or sooner, if the sheriff, &c. shall be thereto required by order of the court, or a judge^d. But there is a *proviso* in the statute 2 W. IV. c. 39.^e that "no writ of "*capias* or *distringas* shall be sufficient, for the purpose of outlawry or waiver, if the same be returned within less than *fifteen* days after the delivery thereof to the sheriff, or other officer to whom the same shall be directed:" and "no first writ shall be available, to prevent the operation of the statute of limitations, unless such writ, and every writ, if any, issued in continuation of a preceding writ, shall be returned *non est inventus*, and entered of record, within *one* calendar month next after the expiration thereof, including the day of such expiration^f; such return to be made, in bailable process, by the sheriff or other officer to whom the writ shall be directed, or his successor in office; and, in pro-

Writ of *distringas*, &c. when to be returned.

^a *Ante*, 51. 77.

^b Sched. to stat. 2 W. IV. c. 39. No.

3. Append. to Chap. IV, &c. § 20.
Ante, 81. 83.

^c Sched. to stat. 2 W. IV. c. 39. No.

4. Append. to Chap. VII, &c. § 2.

Ante, 89, 90. 97.

^d § 5. *Ante*, 99.

^e Stat. 2 W. IV. c. 39. § 10. *Ante*, 51.

77.

CHAP. XIII. "cess not bailable, by the plaintiff or his attorney suing out the
" same, as the case may be." ^a

Mode of pro-
ceeding against
sheriff, &c.
when special bail
is not put in.

If a defendant, having given bail to the sheriff, on an arrest, shall omit to put in special bail, as required by the writ of *capias*, the plaintiff may proceed against the sheriff, to compel him to return the writ ^b, and bring in the body of the defendant ^b; or he may take an assignment of the bail bond ^c, and proceed thereon against the defendant, and his bail to the sheriff ^c.

By rule of court
in term time, or
judge's order in
vacation.

Rule to return
writ, what.
How obtained.

May be had on
last day of term.

When it expires.

Time allowed
for return, when
rule expires in
vacation.

The mode of proceeding against the sheriff, to compel him to return the writ and bring in the body, is by rule of court in *term* time; or by judge's order in *vacation*, on the statute 2 W. IV. c. 39. § 15. The rule to return the writ is a side bar or treasury rule ^d; which may be obtained, in term time, from the clerk of the rules in the King's Bench, or from the *filazer* in the Common Pleas and Exchequer ^d: and, by a late rule of all the courts ^e, it may be obtained on the *last*, as well as on any other days in term. This rule expires in *four* days after service, in *London or Middlesex*; and in *six* days, in any other city or county ^f.

The writ should regularly be returned by the sheriff, on the day on which the rule for returning it expires, if in *term*; but when the rule expired in *vacation*, the sheriff, in the King's Bench, need not formerly have returned it till the *first* day of the ensuing term, and had the whole of that day to file his return ^g. In the Common Pleas, the sheriff, in such case, must have filed his return in *vacation*, and could not have waited till the ensuing term; the Common Pleas

^a Stat. 2 W. IV. c. 39. § 10. *Ante*, 297, &c.; and as to the mode of setting aside the same for irregularity, *id.* 300; or staying them, when regular, upon terms, *id.* 302. and 2d Supplement thereto, 32, 3.

^b For the mode of proceeding against the sheriff, to compel him to return the writ, and bring in the body, see Tidd *Prac.* 9 Ed. 306, &c., and 2d Supplement thereto, 38, 4; and as to the mode of setting aside the proceedings for irregularity, or upon terms, see *id.* 316, &c.

^c Sched. to stat. 2 W. IV. c. 39. No. 4. Append. to Chap. VII, &c. § 5. For the form of an assignment of the bail-bond, see Append. to Chap. XIII. § 1; and for proceedings thereon against bail to the sheriff, see Tidd *Prac.* 9 Ed.

297, &c.; and as to the mode of setting aside the same for irregularity, *id.* 300; or staying them, when regular, upon terms, *id.* 302. and 2d Supplement thereto, 32, 3.

^d Tidd *Prac.* 9 Ed. 484. And for the form of the rule to return the writ, see Append. to Chap. XIII. § 2.

^e R. H. 2 W. IV. reg. 1. § 96. 8 Bing. 303.; and see 2d Supplement to Tidd *Prac.* 9 Ed. 53.

^f Tidd *Prac.* 9 Ed. 307.

^g *Rex v. Sheriff of Berks*, 5 East, 386. 1 Smith R. 427. S. C.

office being supposed to be always open^a: and this was also the practice in the Exchequer^b: But, by a late rule of all the courts^c, "when the rule to return the writ expires in *vacation*, the sheriff shall file the writ at the expiration of the rule, or as soon after as the office shall open:" and, by another rule^d, "the officer with whom it is filed, shall indorse the day and hour when it was filed."

CHAP. XIII.

Filing Writ.

At length, as proceedings may now be had, except at certain times, in term or vacation, it was enacted by the statute 2 W. IV. c. 39.^e that "it shall be lawful, in *term* time, for the court out of which any writ issued by authority of that act, or any writ of *capias ad satisfaciendum*, *feri facias*, or *elegit*, shall have issued, to make rules, and also for any judge of either of the said courts, in *vacation*, to make orders, for the return of any such writ; and every such order shall be of the same force and effect, as a rule of court made for the like purpose: Provided always, that no attachment shall issue for disobedience thereof, until the same shall have been made a rule of court." And, by a general rule of all the courts^f, "in case a judge shall have made an order in *vacation*, for the return of any writ issued by authority of the said act, or any writ of *capias ad satisfaciendum*, *feri facias*, or *elegit*, on any day in *vacation*, and such order shall have been duly served, but obedience shall not have been paid thereto, and the same shall have been made a rule of court in the term then next following, it shall not be necessary to serve such rule of court, or make any fresh demand of performance thereon; but an attachment shall issue forthwith, for disobedience of such order, whether the thing required by such order shall or shall not have been done in the mean time." An *affidavit* of facts must be made, on the above rule, and submitted to the judge, for the purpose of obtaining an order to return the writ in vacation^g; which order must be duly served on the undersheriff^h. And where a judge's order to return the writ is made in vacation, if the sheriff do not make the return by the time limited, an attachment may be

Rules and orders for return of writs, by court in term time, or by judge in vacation.

Attachment for disobedience of judge's order, when made in vacation.

Affidavit for obtaining judge's order.

Proceedings thereon.

^a Rex v. Sheriff of Middlesex, in Thompson v. Powell, 5 Taunt. 647. 1 Marsh. 270. S. C.

^b Smith v. Blyth, 9 Price, 255.

^c R. H. 2 W. IV. reg. 1. § 11. 8 Bing. 289, 90.

^d Id. § 12. 8 Bing. 290.

^e § 15. and see Tidd Prac. 9 Ed. 306, &c.

^f R. M. 3 W. IV. reg. 13. 2 Moore & S. 336. 9 Bing. 446, 7.

^g Append. to Chap. XIII. § 3.

^h Chapm. K. B. 2 Addend. 70. and see Chit. Archb. Pr. 133.

CHAP. XIII. obtained against him, on the *first* day of the next term, on the usual *affidavit* of service of the rule^a, or order^b, and that the writ was not filed by the time therein limited; but the order must first be made a rule of court, though such rule need not be served; and the return of the writ, after the time limited by the order, will not clear the sheriff's contempt, or prevent the attachment from issuing^c.

Returns to writ
of *distringas*.

The returns commonly made by the sheriff to the writ of *distringas*, are either that he has distrained upon the goods and chattels of the defendant, for the sum of 40s. in order to compel his appearance in court, to answer the plaintiff, &c., and that he did, at the time of executing the writ, personally serve the defendant with a true copy thereof, and the notice subscribed thereto, and indorsements thereon^d; or that the defendant is not found in his bailiwick, and hath no goods or chattels therein, by which he can be distrained^e; and, upon the *capias*, the common returns are either *cepi corpus*^f, or *non est inventus*^g; or, on a writ of *capias* against several defendants, the sheriff may return *cepi corpus* as to one defendant, and *non est inventus*^h, or service of the copy of a writⁱ, as to another.

To writ of
capias.

Rule, or order, to
bring in body.

Upon the sheriff's return of *cepi corpus*, to a writ of *capias*, if bail above be not duly put in, or, if put in and excepted to, they do not justify in due time, the plaintiff may proceed against the sheriff, by rule of court in *term* time, or by judge's order in *vacation*, to bring in the body^k: And, by a late rule of all the courts^l, "in case a rule of court, or judges' order, for returning a bailable writ of *capias*, shall expire in vacation, and the sheriff or other officer, having the return of such writ, shall return *cepi corpus* thereon, a judge's order^m may thereupon issue, requiring the sheriff, or other officer, within the like number of days after the

Judge's order
in vacation.

^a Append. to Chap. XIII. § 5.

^b *Id.* § 6. and for the form of a rule for an attachment, for not returning the writ, see *id.* § 7.

^c Chapm. K. B. 2 *Addend.* 69, 70.

^d Append. to Chap. XIII. § 8.

^e *Id.* § 9.

^f *Id.* § 10, 11.

^g *Id.* § 14.

^h *Id.* § 12.

ⁱ *Id.* § 13.

^k Tidd *Prac.* 9 Ed. 297. 309.; and for the form of the rule to bring in the body, in K. B. see Append. to Chap. XIII. § 15; and of the rules given by the *filaxer* and secondary, in C. P. *id.* §§ 16, 17; and by the *filaxer* in the Exchequer, *id.* § 18.

^l R. H. 3 W. IV. 9 Bing. 663. 1 Cromp. & M. 261. 1 Dowl. Rep. 731.

^m Append. to Chap. XIII. § 20.

service of such order, as by the practice of the courts is prescribed with respect to rules to bring in the body issued in term, to bring the defendant into court, by forthwith putting in and perfecting bail above to the action: and if the sheriff, or other officer, shall not duly obey such order, and the same shall have been made a rule of court in the term next following, it shall not be necessary to serve such rule of court, or to make any fresh demand thereon; but an attachment^a shall issue forthwith, for disobedience of such order, whether the bail shall or shall not have been put in and perfected in the meantime. An *affidavit* of facts is necessary, on the latter rule, for obtaining a judge's order to bring in the body in vacation; and the proceedings thereon are similar to those which have been already stated, on a judge's order to return the writ in vacation. But if special bail be put in and perfected, within the time allowed by the rules, or orders, to return the writ and bring in the body, the plaintiff declares, and the cause proceeds in the ordinary way.

CHAP. XIII.

Attachment for disobedience of

Affidavit for obtaining judge's order, &c.

Further proceedings.

^a For the form of an *affidavit*, in support of the rule for an attachment for not bringing in the body, see Append. to

Chap. XIII. § 21; and for the rule for an attachment thereon, *id.* § 22.

CHAP. XV.

Of PROCEEDINGS in ACTIONS against PRISONERS in CUSTODY of the SHERIFF, &c.; and of the MARSHAL of the KING'S BENCH, and WARDEN of the FLEET PRISON.

Prisoners considered as in custody on a civil or criminal account, &c.

PRISONERS in general may be considered as they are in custody on a *civil* or *criminal* account; and on a *civil* account, they are either taken or detained in custody of the *sheriff*, &c., on *mesne* process before, or *final* process after judgment; or they are committed to the custody of the *marshal* of the King's Bench, or *warden* of the *Fleet* prison, on a *cepi corpus*^a, or *habeas corpus*, or surrender in discharge of bail.

Proceedings on arrest.

It has been already seen^b, that when the defendant is arrested on the *capias*, he is either discharged out of custody, upon giving bail to the sheriff, or an attorney's undertaking for his appearance, according to the exigency of the writ, or on depositing in the sheriff's hands, the sum indorsed thereon, together with *ten* pounds in addition, to answer costs, &c. on the statute 43 Geo. III. c. 46. § 2; or he remains in custody, or escapes, or is rescued, &c.

Time for declaring against prisoners, in custody of sheriff, &c.

"If a defendant be taken or charged in custody of the sheriff, upon the writ of *capias*, and imprisoned for want of sureties for his appearance thereto, the plaintiff in such process may, before the end of the next term after the detainer or arrest of such defendant, declare against such defendant, and proceed thereon, in the manner, and according to the directions of the statute 4 & 5 W. & M. c. 21."^c And accordingly, in the notice or *warning* to be written under or indorsed on the writ^d, it is stated, that if a defendant, being in custody, shall be detained on that writ, or if a

^a *Stannard v. Fleet*, Barnes, 392. and see *Tidd Prac.* 9 Ed. 341.

^b *Ante*, 97. 106.

^c Stat. 2 W. IV. c. 59. § 4. And for the mode of proceeding on 43 Geo. III.

c. 46. against prisoners in custody of the sheriff, &c. see *Tidd Prac.* 9 Ed. 341, &c.

^d Sched. to stat. 2 W. IV. c. 39. No. 4. Append. to Chap. VII, &c. § 5.

defendant, being arrested thereon, shall go to prison for want of bail, the plaintiff may declare against any such defendant, before the end of the term next after such detainer or arrest, and proceed thereon to judgment and execution ^a. And, by a late general rule of all the courts ^b, it is declared and ordered, that "in all cases in which a defendant shall have been, or shall be detained in prison, on any writ of *capias* or *detainer*, under the statute 2 W. IV. c. 39., or, being arrested thereon, shall go to prison for want of bail, and in all cases in which he shall have been, or shall be rendered to prison, before declaration, on any such process, the plaintiff in such process shall *declare* against such defendant, before the end of the next term after such arrest or detainer, or render and notice thereof; otherwise such defendant shall be entitled to be discharged from such arrest or detainer, upon entering an appearance according to the form set forth in the aforesaid stat. 2 W. IV. c. 39. *Sched.* No. 2., unless further time to declare shall have been given to such plaintiff, by rule of court, or order of a judge."

The declaration against a prisoner in custody of the sheriff, &c., begins by stating him to be in such custody ^c: And it was formerly necessary, in the King's Bench, when the defendant was in custody of the sheriff, &c., to make *three* copies of the declaration; one to be delivered to the defendant, or left for him with the gaoler or turnkey; another, to be annexed to the original *affidavit* of such delivery, and filed with the clerk of the rules; and a third, to be annexed to an office copy of such affidavit: On which last copy a rule was given, with the clerk of the rules, for the defendant to appear and plead; and in default thereof, judgment might have been signed ^d. In the Common Pleas, the production of a copy of the *affidavit* to the prothonotary being dispensed with ^e, it was only necessary to have *two* copies of the declaration, one to be delivered to the defendant, or left for him with the gaoler or turnkey, and the other to be annexed to an *affidavit* of such delivery; upon which latter copy, the secondary would have given a rule for the defendant to appear and plead. And

Beginning of declaration.

Three copies formerly necessary, against prisoner in custody of sheriff, &c., in K. B.

^a Sched. to stat. 2 W. IV. c. 39. No.

⁴ Append. to Chap. VII, &c. § 5.

^b R. T. 3 W. IV. reg. 1. 10 Bing. 153.

^c Append. to Chap. XV. § 4, 5.

^d R. E. 5 W. & M. reg. 3. § 2. (b.) K. B. and see Tidd *Prac.* 9 Ed. 344, 5.

^e Imp. C. P. 7 Ed. 666. 672.

Two copies only now required.

now, by a late rule of all the courts^a, "when the plaintiff declares against a prisoner, it shall not be necessary to make more than *two* copies of the declaration, of which one shall be served, and another filed, with an *affidavit* of service^b; upon the office copy of which *affidavit* a rule to plead may be given."

Mode of charging defendant in custody of sheriff, &c. by same plaintiff, for a different cause of action, or by a third person.

The mode of *charging* a defendant in actual custody of the sheriff, &c., by the *same* plaintiff or a *third* person, for a *bailable* cause of action, is by making an *affidavit* thereof, and suing out a writ of *capias*, in the form directed by the statute 2 W. IV. c. 39.^c and leaving it at the sheriff's office; but if the cause of action be not bailable, the *same* plaintiff, or a *third* person, may proceed against the defendant, as if he were at large, by serving him with a copy of a writ of *summons*^d.

Ancient mode of detaining prisoner, in custody of marshal, in K. B.

In the King's Bench, when the defendant was committed to the custody of the marshal, on a bill of *Middlesex* or *latitat*, &c., or on an *attachment* of privilege, the plaintiff, in order to detain him, must formerly have filed a *bill* against him, as a prisoner of the court, with the clerk of the declarations in the King's Bench office, and delivered a copy of it to the defendant, or turnkey, at the King's Bench prison^e. In the Common Pleas and Exchequer, when the defendant was a prisoner in custody of the warden of the *Fleet*, it was formerly necessary to bring him up, by *habeas corpus*, to the bar of the court, in order to charge him with a declaration, at the suit of the plaintiff^f: But this latter mode of proceeding was dispensed with by the 8 & 9 W. III. c. 27. § 13. "for the more easy and quick obtaining of judgment, against prisoners in the *Fleet*." And now, by the 2 W. IV. c. 39. § 8. "when it shall be intended to detain, in any personal action, any person, being in the custody of the marshal of the marshalsea of the court of King's Bench, or of the warden of the *Fleet* prison,

In custody of warden, in C. P. and Exchequer.

Present mode of detaining prisoner, in custody of marshal or warden.

Writ of *detainer*.

"the process of *detainer* shall be according to the form of the writ of *detainer*, contained in the schedule to that act, and marked "No. 5."g

^a R. H. 2 W. IV. *reg.* 1. § 36. 8 Bing. 293.

^b Append. to Chap. XV. § 6, 7.

^c § 4.

^d *Ante*, 64. and see *Robertson v. Douglas*, 1 Durnf. & E. 192. Culme

v. Dingle, Barnes, 392, 3. Tidd *Prac.* 9 Ed. 345; but see *Pryme v. Moore, Barnes*, 392.

^e Tidd *Prac.* 9 Ed. 353, 4.

^f *Id.* 355.

^g Append. to Chap. XV. § 2.

This writ is issued on a proper *præcipe*^a, and directed to the marshal of the King's Bench, or warden of the *Fleet* prison^b; commanding him, that he *detain* the defendant, if he shall be found in his custody, at the delivery thereof to him; and him safely keep, in an action on promises, (*or, of debt, &c., as the case may be,*) at the suit of the plaintiff, until he shall be lawfully discharged from his custody^b: and that, on receipt thereof, the said marshal, or warden, do warn the defendant, by serving a copy thereof on him, that within *eight* days after service of such copy, inclusive of the day of such service, he do cause special bail to be put in for him, in the court in which he is sued, to the said action; and that, in default of his so doing, the plaintiff may declare against him, before the end of the term next after his detainer, and proceed thereon to judgment and execution^b: and further commanding the marshal or warden, that immediately after the service thereof, he do return the writ, or a copy thereof, to the said court, together with the day of the service thereof."^b

Direction, and form of writ.

The writ of *detainer* is required to be indorsed, in the same manner as the writ of *capias*^c; but not to contain the warning on that writ^d: And "a copy of such process, and of all indorsements thereon, shall be delivered, together with such process, to the said marshal or warden, to whom the same shall be directed, and who shall forthwith serve such copy upon the defendant personally, or leave the same at his room, lodging, or other place of abode; which process may issue from either of the superior courts of law at *Westminster*; and the declaration thereupon shall and may allege the prisoner to be in the custody of the said marshal or warden, as the fact may be^e; and the proceedings shall be as against prisoners in the custody of the sheriff^f, unless otherwise ordered by some rule to be made by the judges of the said courts."^g By this clause, it appears that the writ of *detainer* may issue from *either* of the superior courts of law at *Westminster*: and as the declaration thereupon may allege the prisoner to be in custody of the marshal or warden, as the fact

Indorsements thereon.

Copy of writ, and indorsements, to be delivered to marshal or warden; who is to serve it on defendant.

Declaration, and proceedings thereon.

Writ may issue from C. P. to marshal, or from K. B. to warden.

^a Append. to Chap. XV. § 1.

5. Append. to Chap. XV. § 2.

^b Sched. to stat. 2 W. IV. c. 39. No.

^c Append. to Chap. XVII. § 8, 9.

5. Append. to Chap. XV. § 2.

^d Sched. to stat. 2 W. IV. c. 39. No.

^e For the proceedings against prisoners in custody of the sheriff, see *Tidd Prac.* 9 Ed. 341, &c.

4. Append. to Chap. VII, &c. § 6. 12.

^f Sched. to stat. 2 W. IV. c. 39. No.

^g Stat. 2 W. IV. c. 39. § 8.

CHAP. XV. may be, and the proceedings shall be as against prisoners in custody of the sheriff, &c., it has been determined, that the court of Common Pleas may issue a writ of *detainer*, directed to the marshal of the King's Bench^a; or the court of King's Bench may issue such writ, directed to the warden of the *Fleet* prison^b: and it is not necessary, in either case, to bring up the prisoner by *habeas corpus*, into the court from which the writ issued, in order to charge him with a declaration^b.

Mode of proceeding against prisoner, on process not bailable.

Prisoner in custody on a criminal account, not chargeable in civil action, without leave.

The mode of proceeding by the *same* plaintiff, or a *third* person, against a prisoner in custody of the marshal or warden, for a cause of action not bailable, is by suing out a writ of *summons*, and serving him with a copy of it, as in ordinary cases^c. But neither the plaintiff, nor a third person, can charge a prisoner with a declaration, or execution^d, in a *civil* action, when he is in custody of the sheriff, or of the marshal or warden, or in any other custody, on a *criminal* account, without leave of the court^e, or a judge; and a prisoner in custody on an *attachment* for a contempt, is holden to be a prisoner in custody on a *criminal* account, within the meaning of this rule^f; though if he accept a declaration, and suffer judgment to go against him without complaining, he has waived the advantage which he might have taken of the irregularity, and shall be bound by it^g. And where one of two defendants was in custody of the marshal on a *criminal* charge, the court of King's Bench allowed him to be brought up on a *habeas corpus ad respondendum*, to be charged with a declaration^h.

Beginning of declaration, against prisoner in custody of marshal or warden.

The declaration against a prisoner in custody of the *marshal* or *warden*, begins by stating him to be in such custodyⁱ: And, by a late rule of all the courts^k, it is ordered, that "in all actions

^a *Millard v. Millman*, 3 Moore & S. 63.

^b *Barnett v. Harris*, 6 Leg. Obs. 236. and see *Chapm. K. B. 2 Addend.* 118. *Atherl. Pr.* 29, &c.

^c *Ante*, 64.

^d *Pletwood v. Turty*, *Pr. Reg.* 325.

^e *Billing's case*, *T. Raym.* 58. 1 Sid. 90. S. C. *Rex v. Jackson*, 1 Lev. 124. 1 Sid. 154. S. C. *Bacon's case*, 1 Lev. 146. *Crackall v. Thompson*, 1 Salk. 354. *R. T. 2 Geo. I. (a.) Goodman v. —*, 1 Dowl. Rep. 128. 3 Leg. Obs.

393, 4. S. C. *per Littleale*, J.

^f *Allgood v. Howard*, *Cas. Pr. C. P.* 27. *Pletwood v. Turty*, *Pr. Reg.* 325.

^g *Pepper v. Bawden*, *Cas. Pr. C. P.* 31. and see *Rose v. Christfield*, 1 Durnf. & E. 591. *Williams v. Scudamore*, 1 Chit. R. 386. *Tidd Prac.* 9 Ed. 345.

^h *Williams v. Smith*, 1 Dowl. Rep. 703. 6 Leg. Obs. 13. S. C.

ⁱ *Append. to Chap. XV. § 4, 5.*

^k *R. T. 3 W. IV. reg. 2.* 10 Bing. 153, 4.

against prisoners in the custody of the marshal of the marshalsea, or of the warden of the *Fleet*, or of the sheriff, the defendant shall plead to the declaration at the same time, in the same manner, and under the same rules, as in actions against defendants who are not in custody."

Time for pleading to declarations against prisoners.

The general object of the provisions of the statute 2 W. IV. c. 39, which have been detailed in this and the *four* preceding chapters, seem to have been, by making the process uniform in all the courts, to simplify the proceedings in *personal* actions, and thereby to render them less embarrassing to the student and practitioner, and prevent unnecessary delay and expense to the parties: And, with a view to the accomplishment of these objects, there is a clause in the statute^a, by which it is enacted, that "it shall and may be lawful to and for the judges of his majesty's superior courts of law at *Westminster*, and they are required, from time to time, to make all such general rules and orders, for the effectual execution of that act, and of the intention and object thereof, and for fixing the costs to be allowed for and in respect of the matters therein contained, and the performance thereof, as in their judgment shall be deemed necessary, or proper; and for that purpose to meet, as soon as conveniently may be, after the passing thereof." In pursuance of the above statute, some general rules were agreed upon by the judges, and promulgated on the first day of *Michaelmas* term 1832, and have since been made by them, which are incorporated in the above chapters, and will be found in the *Appendix*^b.

General object of uniformity of process act.

Judges authorized to make rules for its execution.

Rules made by them, in pursuance thereof.

^a 2 W. IV. c. 39. § 14.

^b *Post*, Part II.

CHAP. XVI.

Of the REMOVAL of CAUSES from INFERIOR COURTS.

Writs for removing suits from inferior courts, into C. P. at *Lancaster*, how returnable.

BY the statute 1 W. IV. c. 7. § 9, for the more speedy judgment and execution, in actions brought in the court of Common Pleas of the county palatine of *Lancaster*, &c., reciting that whereas persons suing in the inferior courts of the county palatine of *Lancaster* were often vexatiously delayed in the recovery of their just demands, by the removal of their suits into the court of Common Pleas at *Lancaster*, by reason that the writs whereby the same were removed, could be made returnable only at the assizes holden for the said county; it is enacted, that “all writs of *pone loquelam*, *recordari facias loquelam*, *accedas ad curiam*, and all other writs “lawfully issued out of the Chancery of the said county palatine of “*Lancaster*, for the removal of causes from the inferior courts of “the said county, into the said court of Common Pleas, which shall “be issued after the expiration of *fourteen* clear days next after “the passing of that act, shall be made returnable on the *first* “*Wednesday* in the month, next after the issuing thereof, unless “in the meantime the assizes shall be holden for the said county; “and if the assizes shall be holden in the meantime, then on the “first or last day of such assizes, as the case may be, next after “the issuing thereof; and that all such writs, made returnable at “any other time than according to the provision thereinbefore contained, shall be utterly null and void to all intents and purposes.”

Uniformity of process act does not extend to inferior courts.

The uniformity of process act^a does not, we have seen^b, extend to any cause removed into either of the superior courts of law at *Westminster*, by writ of *pone*, *certiorari*, *recordari facias loquelam*, *habeas corpus*, or otherwise. The proceedings therefore, in actions of *replevin*, and other personal actions, commenced in *inferior* courts, and removed from thence into *superior* ones, are not af-

^a 2 W. IV. c. 39.

^b *Annot.* 51. 62, 3.

fectured by that act : And if a plaint be levied in an inferior court CHAP. XVI. in due time, and then it be removed into the King's Bench by *habeas corpus*, and the plaintiff declare there *de novo*, and the defendant plead the statute of limitations, the plaintiff may reply, and shew the plaint in the inferior court, and that will be sufficient to avoid the statute ^b.

^a *Ante*, 62, 3.

^b *Matthews v. Philips*, 2 Salk. 424.
Ante, 51.

CHAP. XVII.

Of the DECLARATION.

THE declaration is a specification, in legal form, of the circumstances which constitute the cause of action ; and it is either in *chief*, or by the *bye* ^a. When the defendant has entered an appearance, or the plaintiff has appeared for him, on *serviceable* process, or special bail has been put in and perfected on *bailable* process, the plaintiff may declare against him in *chief*, and proceed thereon to judgment and execution. Declaration, what.

In the King's Bench, when the defendant had appeared and filed bail, upon a bill of *Middlesex*, or *latitat*, &c., or the plaintiff had filed it for him according to the statute, the plaintiff might formerly have declared *by the bye*, in as many different actions as he thought fit, at any time before the end of the term after the return of the process ^b. It was also a settled point, that when bail was filed by the defendant, upon a bill of *Middlesex*, or *latitat*, &c., any other person, besides the plaintiff, might have declared against him *by the bye*, at any time during the term wherein the process By the bye.

^a As to declarations in *chief*, and &c. 1 Sup. thereto, 97. 2 Sup. thereto, by the *bye*, and the time and mode of declaring absolutely, or *de bene esse*, see 43, 4.
^b R. M. 10 Geo. II. reg. 1. (b.) K. B. Tidd *Prac.* 9 Ed. Chap. XVII. p. 419, but see Gilb. K. B. 310.

CH. XVII. was returnable, *sedente curia* ^a. In actions by *original* in the King's Bench, the practice of declaring by the bye was similar to that in the Common Pleas; where the *same* plaintiff was allowed to declare against the defendant by the bye, in as many different actions as he might think fit, at any time before the end of the next term after the return of the process ^b: But he could not have declared by the bye after the end of that term ^c; nor could any other person have declared by the bye, except the plaintiff ^d. In the Exchequer of Pleas, the plaintiff was allowed to declare by the bye, at any time during the term in which the process was returnable ^e; or, as it seems, before the end of the term next after that in which the process was returnable ^f: but no person could declare by the bye, except the original plaintiff ^g. As it is declared, however, by the uniformity of process act ^h, that the writs thereinbefore authorized shall be the only writs for the commencement of *personal* actions, in any of the courts therein mentioned, in the cases to which such writs are applicable ⁱ; and as the proceedings under that act may, generally speaking, be had in *vacation*, as well as in *term* time, it has been doubted, whether the practice of declaring *by the bye* is not altogether abolished ^k. But it seems that the *same* plaintiff may, after the defendant has appeared, declare against him *by the bye*, for a different cause of action from what is expressed in the process ^l; though it is generally agreed that no other person, except the plaintiff, can declare by the bye.

Time to declare. The plaintiff should regularly declare in *chief*, before the end of the next term after the appearance of the defendant; or, if he do not appear, before the end of the next term after the *eighth* day *inclusive* from the execution of the writ: And, by a late rule of all the courts ^m, "a plaintiff shall be deemed out of court, unless he

^a Dennis v. Mannaring, Poph. 145.

Jones (or Bands) v. Bodinner, Carth.

377. 1 Salk. 2. S. C. Gilb. K. B. 310.

342. Sulyard v. Harris, 4 Bur. 2181.

Smith v. Muller, 3 Durnf. & E. 627.

^b Wreeke v. Robbins, Pr. Reg. 142.

^c Dunn v. Hutt, Barnes, 346.

^d Methwin v. Pople, Cas. Pr. C. P. 6.

^e Man. Ex. Pr. 181, 2.

^f Dax Excheq. 1 Ed. 53.

^g Man. Ex. Pr. 182. Griffith v.

Humphreys, 3 Younge & J. 218. and see Tidd Prac. 9 Ed. 419. 424, 5.

^h 2 W. IV. c. 39. § 21.

ⁱ *Ante*, 61.

^k Sup. to Petersd. Pr. 20. 1 Chit. Archb. Pr. 180.

^l *Sed quære*; and see Athert. Pr. 89, 90. 102, &c.

^m R. H. 2 W. IV. reg. 1. § 35. 8 Bing. 293.

declare within *one year* after the process is returnable." In an action, therefore, for a malicious arrest, proof that no declaration was filed or delivered within a year after the return of the writ, has been deemed sufficient to shew a determination of the suit ^a.

If the plaintiff be not ready to declare in due time, he may obtain a side bar or treasury rule from the clerk of the rules in the King's Bench ^b, or one of the secondaries in the Common Pleas ^c, for time to declare until the first day of the ensuing term; and, in the Common Pleas, there is no difference in this respect between a rule for time to declare in *replevin*, and in other actions ^d. In the Exchequer of Pleas, the mode of obtaining time to declare was formerly by summons and order of a baron ^e; and the time given was in the discretion of the baron making the order, regulated by the cause of action, and circumstances of the case ^f: But, by a late rule of all the courts ^g, the plaintiff may have a rule for time to declare in the court of Exchequer, as well as in the other courts." If the plaintiff be still unprepared, he may obtain rules for *further* time to declare ^h, from the beginning to the end of the term, and from the end of one term to the beginning of another, alternately, as often as may be necessary; but, after several rules have been obtained, the courts will make a *peremptory* one, for the plaintiff to declare before the end of the term in which the motion is made. The rule for this purpose, in the King's Bench, was absolute in the first instance ⁱ; and drawn up on a motion paper signed by counsel: In the Common Pleas, it was formerly a rule to shew cause ^k: But, by a late rule of all the courts ^l, "a rule to declare *peremptorily* may be absolute in the first instance."

The mode of *entitling* declarations is settled by a general rule of all the courts ^m, by which it is ordered, that "every declaration shall in future be *entitled* in the proper court, and of the day of the

CH. XVII.

Rule for time to declare.

In Exchequer.

Rule for further time.

Peremptory rule to declare.

Absolute in first instance.

Title, and commencement of declaration.

^a *Pierce v. Street*, 3 Barn. & Ad. 397. XVII. § 5.

^b Append. to Chap. XVII. § 1. ^k *Id.* § 6.

^c *Id.* § 2. ^l R. H. 2 W. IV. reg. 1. § 39. 8

^d *Craven v. Lady Vavasour*, 5 Taunt. Bing. 293.

^e R. M. 3 W. IV. reg. 15. 2 Moore

^f Dax Pr. 54. & S. 337. 9 Bing. 447. For the title

^g Price Pr. 215. of a declaration, on this rule, see Append.

^h R. H. 2 W. IV. reg. 1. § 38. 8 to Chap. XVII. § 5.; and as to the

Bing. 293. mode of *entitling* declarations before the

ⁱ Append. to Chap. XVII. § 1, 2. statute, see Tidd *Prac.* 9 Ed. 423, 6.

^k Append. to Tidd *Prac.* 9 Ed. Chap.

CH. XVII. month and year on which it is filed or delivered": but it has been doubted, whether this part of the rule applies to declarations in *ejectment*^a. This rule also contains the Forms to be used for the commencement of declarations^b, after *summons* or *arrest*, which will be found in the *Appendix*^c; and declares, that the entry of *pledges* to prosecute, at the conclusion of the declaration, shall in future be discontinued^d. Since the making of this rule, it is not necessary to state, in a declaration in the Exchequer, that the plaintiff is a debtor to the king, or that he is less able to pay the king's debts^e: and it is no ground of special demurrer, that the plaintiff omits to describe the nature of the action, at the commencement of the declaration^f. The declaration should regularly correspond with the process, in the names of the *parties* to the action, the description of the *character* in which they sue or are sued, and the nature of the *cause of action*^g: and therefore, where the writ of *summons* was to answer the plaintiff in "an action of *trespass on the case* upon promises," and the notice of declaration in "an action of *trespass on the case*," the court, we have seen^h, set aside the proceedings for irregularityⁱ.

Pledges to prosecute discontinued.

Form of declaration.

Correspondence of, with process.

Delivering declaration, when defendant has appeared, on serviceable process.

Filing it, after plaintiff has appeared for him.

When the defendant has appeared on the writ of *summons*, &c., a copy of the declaration should be delivered to his attorney, or to himself, if he has appeared in person, with an indorsement thereon to plead within *four* days, if the venue be laid in *London* or *Middlesex*, and the defendant live within *twenty* miles of *London*; or, if he live above *twenty* miles from *London*, or the venue be laid in any other county than *London* or *Middlesex*, then the indorsement must be to plead within *eight* days after the delivery thereof^k. If the defendant has *not* appeared according to the exigency of the writ, the plaintiff may, at the expiration of *eight*

^a *Doe d. Haines v. Roe*, 2 Moore & S. 619. and *vide ante*, 62.

^b As to the commencement of declarations before the statute, see *Tidd Prac.* 9 Ed. 432, 3; and for forms applicable thereto, *Append. to Tidd Prac.* Chap. XVII. § 7, &c.

^c *Append. to Chap. XVII.* §§ 6, 7, 8, 9.

^d *R. M. 3 W. IV. reg.* 15. 2 Moore & S. 337. 9 Bing. 448.

^e *Hirst (or Hunt) v. Pitt*, 1 Crompt.

& M. 324. 1 Dowl. Rep. 659. S. C.

^f *Marshall (or Anderson) v. Thomas*, 3 Moore & S. 98. 9 Bing. 678. S. C.

^g *Tidd Prac.* 9 Ed. 446, &c.

^h *Ante*, 67.

ⁱ *King v. Skeffington*, 1 Crompt. & M. 363. 1 Dowl. Rep. 686. S. C. and see *Anon. id.* 687. (a.) *Ante*, 66, 7.

^k *Tidd Prac.* 9 Ed. 451, 2. and see *Chapm. K. B. 2 Addend.* 105, 6.

days after the service thereof, appear for him, according to the statute; and in that case, a copy of the declaration must be *filed* with the clerk of the declarations in the King's Bench, or prothonotaries in the Common Pleas, or in the office of pleas in the Exchequer, and notice thereof delivered to, or left at the last or most usual place of abode of the defendant, if known; in which notice should be expressed the nature of the action, at whose suit it is prosecuted, and the time limited by the rules of the court for pleading; and that in case the defendant do not plead by such limited time, judgment will be entered against him by default^a. In this notice it is not necessary to state the amount of the damages^b: and, by a late rule of all the courts^c, "where the residence of a defendant is unknown, notice of declaration may be stuck up in the office; but not without previous leave of the court:" The rule in such case, on a proper *affidavit*^d, is absolute in the first instance^e. The declaration, in the foregoing cases, must be delivered or filed *absolutely*^f: and as the plaintiff may enter an appearance for the defendant, when he has been served with the writ of *summons*, or a *distingas* has been executed, there is no occasion for his declaring *de bene esse* on *serviceable* process.

In *bailable* actions, where the defendant has put in and perfected special bail, a copy of the declaration should be *delivered* to his attorney absolutely^g; with an indorsement thereon, that the defendant must plead thereto in *four* (or *eight*) days, as the case may be, according to the defendant's residence, and the venue^h. And, by a general rule of all the courtsⁱ, it is ordered, that "upon all writs of *capias*, where the defendant shall not be in actual custody, the plaintiff, at the expiration of *eight* days after the execution of

CH. XVII.

Notice of.

Need not state amount of damages.

Sticking up in office.

Declaration must be delivered or filed absolutely, on serviceable process.

Delivery of declaration absolutely, in bailable actions, when defendant has put in and perfected special bail.

^a Append. to Chap. XVII. § 11. and see Tidd *Prac.* 9 Ed. 452. Chapm. K. B. 2 *Addend.* 106, 7.

^b R. H. 2 W. IV. *reg.* 1. § 41. 8 Bing. 293. and see Tidd *Prac.* 9 Ed. 457. 2d Supplement thereto, 48.

^c R. H. 2 W. IV. *reg.* 1. § 49. 8 Bing. 295.

^d Append. to Chap. XVII. § 12.

^e Bridger v. Austin, 1 Moore & S. 520. 1 Dowl. Rep. 272. S. C. The *affidavit* in support of the motion in this case, stated the last known place of abode

of the defendant, that he had not been there for two months past, and that the deponent, notwithstanding diligent endeavours, could not ascertain where his present residence was.

^f As to delivering or filing declarations *absolutely*, see Tidd *Prac.* 9 Ed. 451, 2.

^g *Id.* 452.

^h Chapm. K. B. 2 *Addend.* 110.

ⁱ R. M. 3 W. IV. *reg.* 2. 2 Moore & S. 335. 9 Bing. 446.

CH. XVII. the writ, inclusive of the day of such execution, shall be at liberty to declare *de bene esse*, in case special bail shall not have been perfected." If the defendant therefore, at the expiration of *eight* days after the execution of the writ, put in special bail, which is not perfected, and the plaintiff be dissatisfied therewith, he may then, in pursuance of the above rule, deliver a copy of the declaration *de bene esse*^a, or conditionally, to the defendant's attorney, indorsed as follows: "delivered conditionally, until special bail be perfected, and the defendant must plead hereto in *four* (or *eight*) days."

Delivery of declaration *de bene esse*, when special bail has been put in, and not perfected.

Filing declaration *de bene esse*, when special bail has not been put in.

Notice thereof.

When one defendant is arrested, and others served.

Good, if filed, from time of notice only.

Judgment of *non pros*, for not declaring.

If the defendant has not put in special bail, a copy of the declaration may be filed *de bene esse*, with the clerk of the declarations in the King's Bench, or prothonotaries in the Common Pleas, or in the office of pleas in the Exchequer, with an indorsement thereon, stating that it is filed *conditionally*, until special bail is put in and perfected; and the defendant must plead thereto in *four* (or *eight*) days, &c.^b: and notice of filing the declaration must, in that case, be given to the defendant as before mentioned^b. And "if there be several defendants, and one or more of them shall have been served only, and not arrested, and the defendant or defendants so served shall not have entered a common appearance, the plaintiff shall be at liberty to enter a common appearance for him or them, and declare against him or them in *chief*, and *de bene esse* against the defendant or defendants who shall have been arrested, and shall not have perfected special bail."^c Where a declaration is *filed*, it is deemed to be a good declaration only from the time of giving notice thereof: and therefore, where a declaration *de bene esse* was filed, and the defendant entered an appearance before notice was given of filing it, the declaration, and all subsequent proceedings, were set aside for irregularity^d.

If the plaintiff do not declare in due time, he is liable to be *non-prossed*, or have judgment signed against him, for not prosecuting his suit. This judgment is founded on the statute 13 Car. II. stat. 2. c. 2, § 3, by which it is enacted, that "upon an appearance entered for the defendant by attorney, in the term wherein the

^a Chapm. K. B. 2 *Addend.* 110; and as to filing or delivering declarations *de bene esse*, see Tidd *Prac.* 9 Ed. 453, 4, 5.

^b Chapm. K. B. 2 *Addend.* 106, 7, 8. Append. to Chap. XVII. § 13.

^c R. M. 3 W. IV. *reg.* 2. 2 Moore & S. 335. 9 Bing. 446.

^d Weddle v. Brazier, 1 Crompt. & M. 69. 3 Tyr. Rep. 237. 1 Dowl. Rep. 639. S. C., and see Tidd *Prac.* 9 Ed. 456.

“ process is returnable, unless the plaintiff shall put into the court CH. XVII.
 “ from whence the process issued, his bill or declaration against
 “ the defendant, in some *personal* action, or *ejectment* of farm,
 “ before the end of the term next following after appearance, a non-
 “ suit, for want of a declaration, may be entered against him; and
 “ the defendant shall have judgment to recover costs against the
 “ plaintiff, to be taxed and levied in like manner as upon the 23
 “ Hen. VIII.”^a And as the appearance may now be entered by the When signed.
 defendant in *vacation*, as well as in *term* time^b, it seems that when
 it is entered in *vacation*, the plaintiff must declare before the end
 of the next term after such appearance, or, if the defendant do not
 appear, before the end of the next term after the *eighth* day in-
 clusive from the execution of the writ, otherwise a judgment of
non pros may be signed.

In the King's Bench, a judgment of *non pros* might have been Rule to declare,
 formerly signed, without entering any rule to declare, or calling and demand of
 for a declaration^c; but, in the Common Pleas, the defendant must, declaration.
 before the end of the second term, or within *four* days after, have
 entered a rule for the plaintiff to declare, and demanded a declara-
 tion^d. To assimilate the practice in this respect, it was ordered,
 by a late rule of all the courts^e, that “ it shall not be necessary for
 a defendant, in any case, to give a rule to declare, except upon
 removal from inferior courts.” But, by a previous rule^f, “ no
 judgment of *non pros* shall be signed for want of a declaration,
 until *four* days next after a *demand*^g thereof shall have been made
 in writing, upon the plaintiff, his attorney or agent, as the case
 may be.”

^a c. 15.see Tidd *Prac.* 9 Ed. 417, 18. 421, 2.
463.^b Stat. 2 W. IV. c. 39. § 2. and see
id. § 11. *Ante*, 100. 103.^c R. H. 2 W. IV. *reg.* 1. § 38. 8
Bing. 293.^d R. M. 10 Geo. II. *reg.* 2. (b.) K. B.
Gilb. K. B. 345.^e R. T. 1 W. IV. *reg.* 4. 2 Barn. &
Ad. 789. 7 Bing. 784. 1 Crompt. & J.
471.^f R. H. 9 Ann. *reg.* 3. C. P. Imp.
C. P. 7 Ed. 194, 5; and as to the rule
to declare, and demand of declaration,^g Append. to Chap. XVII. § 14.

CHAP. XVIII.

Of IMPARLANCE, and TIME for PLEADING, &c.

Impar-
lance,
what.

General.

Special.

General special.

In what cases
defendant must
plead, without
imparlance.

IMPARLANCE is said to be, when the court gives a party leave to answer at another time, without the assent of the other party^a; and, in this sense, it signified time to reply, rejoin, surrejoin, &c.^a But the more common signification of imparlance was time to plead^b: and it was either *general*^c, without saving any exception to the defendant, which was always to another term^d, or *special*, which was sometimes to another day in the same term^e, with a saving of all exceptions to the writ, bill, or count; or, of all exceptions whatsoever: which latter was called a *general special* imparlance^f.

Formerly, when the process, in the King's Bench, was returnable the last general return of the term^g; or, in the Common Pleas, when it was returnable on that return, and the declaration was not filed or delivered on the return day, or on the day following^h; or where the process, in either court, was returnable before, but the declaration was not delivered, or filed and notice thereof given, *four days exclusive* before the end of the termⁱ, the defendant, if completely in court, was entitled to an imparlance; and must have pleaded within the first *four* days of the next term; provided the declaration

^a Com. Dig. tit. *Pleader*, D. 1.

Anon. 2 Mod. 62. Anon. 2 Show. 310. Dowding v. Baker, Barnes, 346. 2 Wms. Saund. 5 Ed. 1. c. (2.)

^c Clapham v. Lenthall, Hardr. 365. Wentworth v. Squibb, 1 Lutw. 46. 12 Mod. 529. S. C. Gilb. C. P. 183. 311. 4 Bac. Abr. 27, 8. 3 Blac. Com. 301.

^d Longworth v. Thistleworth, 6 Mod. 28.

^e Staple v. Haydon, *Id.* 8. Case of University of Cambridge, 10 Mod. 127. Com. Dig. tit. *Pleader*, D. 1.

^f For an account of the different kinds

of imparlances, when and how granted, and what might or might not have been done after each of them, see 2 Wms. Saund. 5 Ed. 1. (2.) 1 Chit. Pl. 4 Ed. 375, &c. Grant v. Ld. Sondes, 2 Blac. Rep. 1094. Tidd *Proc.* 9 Ed. 462.

^g R. T. 5 & 6 Geo. II. (b.) R. M. 10 Geo. II. reg. 2. R. T. 23 Geo. III. K. B.

^h R. H. 35 Geo. III. C. P. 2 H. Blac. oct. Ed. 551. 7 Taunt. 71. (a.) 2 Marsh. 337. (a.) 2 Chit. R. 381.

ⁱ R. T. 5 & 6 Geo. II. (b.) K. B.

were delivered, or filed and notice thereof given, before the essoin CH. XVIII. day of that term; otherwise the defendant was allowed to imparl to the subsequent term^a. By a late rule, however, of all the courts^b, "upon every declaration delivered, or filed, on or before "the *last* day of any term, the defendant, whether in or out of "any prison, was compellable to plead as of such term, without "being entitled to any imparlance." Upon this rule it was holden, that if the writ and appearance were of one term, and the declaration of another, the defendant was still entitled to an imparlance^c. But now, as the time for pleading is no longer regulated by *terms*; but the proceedings, we have seen^d, may be had on writs, except at certain times, in term or *vacation*; the practice of *imparling* is, it seems, abolished by the statute 2 W. IV. c. 39.^e, so far as it is dependent on the *terms*; but some of its consequences, as affecting particular proceedings, such as pleas to the *jurisdiction*, or in *abatement*, or claiming *conusance*, &c. may still remain.

In case the time for pleading to any declaration, or for answering any pleading, shall not have expired before the 10th day of *August* in any year, the party called upon to plead, reply, &c., shall, we have seen^f, have the same number of days for that purpose, after the 24th day of *October*, as if the declaration, or preceding pleading, had been delivered or filed on the 24th day of *October*; but in such cases, it shall not be necessary to have a second rule to plead, reply, &c. And where a writ issued in vacation, and a declaration was delivered, and rule to plead given, in the same vacation, but the plaintiff did not sign judgment until the ensuing term, the court of Exchequer held, that it was not necessary to give a new rule to plead in that term^g.

Time for pleading, &c. when it does not expire before 10th August.

When judgment may be signed, without giving a new rule to plead.

^a Vidian's Introd. II. 2 Wms. Saund. 5 Ed. 1. c. (2.) and see Smith v. Had- don, 1 Leg. Obs. 156. per Littleale, J. Anon. 2 Leg. Obs. 78. per Patteson, J. Tidd Prac. 9 Ed. 466, 7.

^b R. T. 1 W. IV. reg. 3. 2 Barn. & Ad. 789. 7 Bing. 784. 1 Crompt. & J. 471.

^c Edensor v. Hoffman, 2 Crompt. & J. 140. 1 Price N. R. 175. 1 Dowl. Rep. 304. S. C. Thomson v. Smith, 1 Dowl. Rep. 391. per Taunton, J. Irving v. Williamson, E. 2 W. IV. K. B. per

Taunton, J. accord: and see Millingen v. Truss, 1 Price N. R. 59. Whalley v. Barnet, 3 Tyr. Rep. 239. 1 Dowl. Rep. 607. S. C. Excheq.

^d Ante, 100.

^e Sup. to Petersd. Pr. 20. Chapm. K. B. 2 Addend. 167. 1 Chit. Archb. Pr. 195. but see Athert. Pr. 90. 107. 110.

^f Ante, 101.

^g Mould v. Murphy, 1 Crompt. & M. 495.; and see Fagg v. Borsley, 6 Leg. Obs. 478. Excheq.

CHAP. XX.

Of the INTERPLEADER ACT, &c.

Provisions of
stat. 1 & 2 W.
IV. c. 58.

IT may here be proper to notice, as connected with the subject of staying proceedings, the provisions of the statute 1 & 2 W. IV. c. 58. to enable courts of law to give relief against adverse claims, made upon persons having no interest in the subject of such claims. These provisions are of two kinds; first, such as relate to the property in money or goods, where claims are made by different parties, one of whom has brought an action against the person in possession of them, and the defendant does not claim any interest therein; and secondly, for the relief of sheriffs, and other officers, in execution of process against goods and chattels. The former will be treated of in this, and the latter in a subsequent chapter^a.

Means of relief,
before that sta-
tute.

Before the making of the above statute, it often happened, that a person sued at law for the recovery of money or goods, wherein he had no interest, and which were also claimed of him by some third party, had no means of relieving himself from such adverse claims, but by a suit in equity against the plaintiff and such third party, usually called a bill of *Interpleader*, which was attended with expense and delay^b; for remedy whereof, it is enacted by the above statute, that “upon application made by or on the behalf of any defendant sued in any of his majesty’s courts of law “at *Westminster*, or in the court of Common Pleas of the county “palatine of *Lancaster*, or the court of pleas of the county palatine of *Durham*, in any action of *assumpsit*, *debt*, *detinue*, or “*trover*, such application being made after declaration and before “plea, by *affidavit*^c or otherwise, shewing that such defendant does “not claim any interest in the subject matter of the suit, but that “the right thereto is claimed, or supposed to belong to some third

Upon applica-
tion by de-
fendant, in an
action of *as-
sumpsit*, &c.
stating that the
right in the sub-
ject matter is
claimed by a
third party, the
court, or a
judge, may order
such third party
to appear and

^a Chap. XLI.

24, 5. 76, 7.

^b See the preamble to stat. 1 & 2 W.
IV. c. 58. and 2 Rep. C. L. Com.

^c Append. to Chap. XX. § 4.

" party, who has sued or is expected to sue for the same, and that
 " such defendant does not in any manner collude with such third
 " party, but is ready to bring into court, or to pay or dispose of
 " the subject matter of the action, in such manner as the court, or
 " any judge thereof, may order or direct; it shall be lawful for the
 " court, or any judge thereof, to make rules ^a, and orders ^a, calling
 " upon such third party to appear, and to state the nature and par-
 " ticulars of his claim, and maintain or relinquish his claim; and
 " upon such rule or order, to hear the allegations as well of such
 " third party as of the plaintiff, and in the mean time to stay the
 " proceedings in such action; and finally, to order such third party
 " to make himself defendant in the same, or some other action, or
 " to proceed to trial on one or more *feigned* issue or issues ^b; and
 " also to direct which of the parties shall be plaintiff or defendant
 " on such trial; or, with the *consent* of the plaintiff and such third
 " party, their counsel or attornies, to dispose of the merits of their
 " claims, and determine the same, in a summary manner ^c; and to
 " make such other rules and orders therein, as to costs and all
 " other matters, as may appear to be just and reasonable ^d: And
 " that the judgment in any such action or issue as may be directed
 " by the court or judge, and the decision of the court or judge in
 " a summary manner, shall be final and conclusive against the par-
 " ties, and all persons claiming by, from, or under them." ^e

maintain or re-
linquish his
claim; and, in
the mean time,
stay proceedings
in such action.

Adverse claims,
how tried and
determined.

Judgment and
decision of court
or judge to be
final.

" That if such third party shall not appear, upon such rule or order,
 " to maintain or relinquish his claim, being duly served therewith, or
 " shall neglect or refuse to comply with any rule or order to be
 " made after appearance, it shall be lawful for the court or judge to
 " declare such third party, and all persons claiming by, from, or
 " under him, to be for ever barred from prosecuting his claim against
 " the original defendant, his executors or administrators; saving
 " nevertheless, the right or claim of such third party against the
 " plaintiff; and thereupon to make such order, between such de-
 " fendant and the plaintiff, as to costs and other matters, as may
 " appear just and reasonable." ^f

If such third
party shall not
appear, &c. the
court or judge
may bar his claim
against the ori-
ginal defendant.

" Provided always, that no order shall be made in pursuance
 " of that act, by a single judge of the court of pleas of the said

Proviso as to
orders made by
a single judge.

^a For the form of a rule *nisi*, and
 summons to shew cause, on the above
 statute, see Append. to Chap. XX. § 2. b.

^b *Id.* § 3.

^c *Id.* § 6.

^d Stat. 1 & 2 W. IV. c. 58. § 1.

^e *Id.* § 2.

^f *Id.* § 3.

If judge think the matter more fit for their decision, he may refer it to the court.

Decisions on this statute.

" county palatine of *Durham*, who shall not also be a judge of one
 " of the said courts at *Westminster*: and that every order to be
 " made in pursuance of that act, by a single judge not sitting in
 " open court, shall be liable to be rescinded or altered by the
 " court, in like manner as other orders made by a single judge."^a
 " Provided also, that if, upon application to a judge in the first in-
 " stance, or in any later stage of the proceedings, he shall think
 " the matter more fit for the decision of the court, it shall be law-
 " ful for him to refer the matter to the court; and thereupon the
 " court shall and may hear and dispose of the same, in the same
 " manner as if the proceeding had originally commenced by rule
 " of court, instead of the order of a judge."^b

On this statute it has been decided, that a party who, by his own act, is placed in a situation to be sued, cannot call on the court to substitute another defendant in his stead^c. So, the case of a wharfinger, who claims a lien on goods for wharfage, &c. which attaches only upon one of the parties by whom the goods are claimed, is not, it seems, within the meaning of the statute^d. And where a defendant has been indemnified by a third party, for not delivering up property in his possession, he has no right to relief under the above act; and the court will discharge a rule obtained for that purpose, with costs^e. But a lien attaching upon the goods in dispute, and which must be satisfied by whichever party ultimately turns out to be entitled to them, does not prevent the party who holds the goods, from applying to the court for relief, under the above act^f. The costs of the applicant, where he has acted *bona fide*, will, in the first instance, be directed to be paid out of the fund, or proceeds of the goods in dispute, to be repaid by the party ultimately unsuccessful^g. And where an issue has been directed by the court, to try the rights of contending parties to the property in

^a Stat. 1 & 2 W. IV. c. 58, § 4.

^b § 5. There is also a clause in the act, (§ 7.) that all rules, orders, &c. made in pursuance thereof, may be entered of record, &c.; which will be noticed in Chap. XLI. when treating of the relief of sheriffs, and other officers, in the execution of process against goods and chattels.

^c *Belcher v. Smith*, 9 Bing. 82. 2

Moore & S. 184. S. C.

^d *Braddick v. Smith*, 2 *Moore & S.* 131. 9 Bing. 84. S. C.

^e *Tucker v. Morris*, 1 *Crompt. & M.* 73. 1 *Dowl. Rep.* 639. S. C.

^f *Cotter v. Bank of England*, 3 *Moore & S.* 180.

^g *Duear v. Mackintosh*, 3 *Moore & S.* 174. *Cotter v. Bank of England*, *id.* 180.

question, and the intermediate party has paid money into court, to abide the event of the issue, the successful party cannot move to have the money paid out to him, until final judgment has been signed ^a. CHAP. XX.

^a *Cooper v. Lead Smelting Company*, of motion, and rules of court in this case,
² *Moore & S.* 810. ⁹ *Bing.* 634. ¹ see Append. to Chap. XX. § 1, 2, 3.
Dowl. Rep. 728. S. C. For the notice

CHAP. XXII.

Of WRITS of INQUIRY of DAMAGES, and IMMEDIATE JUDGMENT and EXECUTION thereon; and of PROCEEDINGS for ASSESSING DAMAGES, on the STATUTE 8 & 9 W. III. c. 11. § 8.

BEFORE the late act for the more speedy judgment and execution in actions, brought in his majesty's courts of law at *Westminster*, and in the court of Common Pleas of the county palatine of *Lancaster* ^a, &c. writs of inquiry could only have been made returnable in term time ^b; and consequently, when they were executed in vacation, the plaintiff must have waited until the ensuing term, before he could have obtained final judgment, or taken out execution. This practice having occasioned great delay, by reason of the interval between the terms, it was enacted by the above statute ^c, that "any writ of inquiry of damages, to be issued in or by either of the said courts, by whatever form of process the action may have been commenced, may be made returnable, and be returned on any day certain, in term or vacation, to be named in such writ; and such writ shall be as valid and effectual, as if the same had been returnable according to the course of the

Writs of inquiry,
 how returnable,
 before stat. 1
 W. IV. c. 7.

May now be
 made returnable
 on any day to be
 named therein.

^a Stat. 1 W. IV. c. 7.

^c § 1.

^b *Tidd Prac.* 9 Ed. 574.

Proceedings to be had at the return thereof.

" common law ; and thereupon, at the return thereof, a rule for
 " judgment may be given ^a, costs taxed, and final judgment signed,
 " and execution issued forthwith ; unless the sheriff, or other officer
 " before whom the same may be executed, shall certify ^b under
 " his hand, upon such writ, that judgment ought not to be signed,
 " until the defendant shall have had an opportunity to apply to the
 " court, to set aside the execution of such writ, or one of the
 " judges of the said court shall think fit to order ^c the judgment to
 " be stayed, until a day to be named in such order. Provided
 " always, that in case the signing of judgment on such writ shall
 " be postponed, by reason of such certificate or order, or by the
 " choice of the plaintiff, or otherwise, and judgment shall be after-
 " wards signed thereon, such judgment shall be entered of record,
 " as of the day of the return of such writ, unless the court shall
 " otherwise direct."

Entering and recording of judgment.

And it is thereby further enacted, that " every judgment to be
 " signed by virtue of that act, may be entered and recorded as the
 " judgment of the court wherein the action shall be depending,
 " although the court may not be sitting on the day of the signing
 " thereof ; and every execution issued by virtue of that act, shall
 " and may bear *teste* on the day of issuing thereof ; and such judg-
 " ment and execution shall be as valid and effectual, as if the
 " same had been signed and recorded, and issued, according to the
 " course of the common law."^d

Teste of execution.

Judgment may be vacated, execution stayed, and new writ of inquiry granted.

" Provided always, that notwithstanding any judgment signed or
 " recorded, or execution issued, by virtue of that act, it shall be
 " lawful for the court in which the action shall have been brought,
 " to order such judgment to be vacated, and execution to be stayed
 " or set aside, and to enter an arrest of judgment, or grant a new
 " writ of inquiry, as justice may appear to require ; and thereupon
 " the party affected by such writ of execution, shall be restored to
 " all that he may have lost thereby, in such manner as upon the re-
 " versal of a judgment, by writ of error or otherwise, as the court
 " may think fit to direct."^e

^a By a late rule of all the courts, (R. H. 2 W. IV. reg. 1. § 67. 6 Bing. 297, 8.) judgment may now be signed, after the return of a writ of inquiry, at the expiration of four days from such return,

without any rule for judgment. *Post*, 136.

^b Append. to Chap. XXII. § 1, 2.

^c *Id.* § 3, 4.

^d Stat. 1 W. IV. c. 7. § 3.

^e *Id.* § 4.

By a previous act of parliament^a, (for better regulating the practice, and preventing delays in the proceedings of the court of Common Pleas at *Lancaster*,) writs of inquiry of damages, and certain other writs in the said act in that behalf mentioned, issued by and out of the same court, might have been made returnable on any of the return days in *Easter* and *Michaelmas* terms respectively, according to the course of his majesty's court of Common Pleas at *Westminster*, in addition to the first and last days of each assizes held for the said county : And it being deemed expedient to quicken the proceedings in the said court of the said county, it is enacted by the statute 1 W. IV. c. 7.^b, that "in lieu of the return days in *Easter* and *Michaelmas* terms, all writs of inquiry of damages, and other writs in the said last mentioned act in that behalf mentioned, shall and may be made returnable in the said court of the said county, on the first *Wednesday* in every month, in addition to the first and last days of each assizes held for the said county ; and such proceedings shall and may be had on the return thereof, as upon such writs returnable according to the law in force at and before the passing of that act."

Writs of inquiry, &c. how returnable in Common Pleas at *Lancaster*, before stat. 1 W. IV. c. 7.

By that statute.

By the statute 8 & 9 W. III. c. 11. § 8, it is enacted, that "in all actions upon any bond or bonds, or on any penal sum, for non-performance of any covenants or agreements in any indenture, deed, or writing contained, if judgment shall be given for the plaintiff on a demurrer, or by confession or *nihil dicit*, the plaintiff, upon the roll, may suggest as many breaches of the covenants and agreements as he shall think fit ; upon which shall issue a writ to the sheriff of that county where the action shall be brought, to summon a jury to appear before the justices or justice of assize or *nisi prius* of that county, to enquire of the truth of every one of those breaches, and to assess the damages that the plaintiff shall have sustained thereby ; in which writ it shall be commanded to the said justices or justice of assize or *nisi prius*, that he or they shall make a return thereof, to the court from whence the same shall issue, at the time in such writ mentioned. And in case defendant or defendants, after such judgment entered, and before any execution executed, shall pay unto

Proceedings for assessing damages, on breaches suggested, under stat. 8 & 9 W. III. c. 11. § 8.

Defendant paying damages, execution may be stayed.

^a 39 & 40 Geo. III. c. 105. § 2. and ^b § 8.
see stat. 22 Geo. II. c. 46. § 35.

CH. XXII. "the court where the action shall be brought, to the use of the
 "plaintiff or plaintiffs, or his or their executors or administrators,
 "such damages so to be assessed, by reason of all or any of the
 "breaches of such covenants, together with the costs of suit, a
 "stay of execution of the said judgment shall be entered upon
 "record; or if, by reason of any execution executed, the plaintiff
 "or plaintiffs, or his or their executors or administrators, shall be
 "fully paid or satisfied all such damages so to be assessed, to-
 "gether with his or their costs of suit, and all reasonable charges
 "and expenses for executing the said execution, the body, lands
 "or goods of the defendant, shall be thereupon forthwith dis-
 "charged from the said execution, which shall likewise be entered
 "upon record. But, notwithstanding, such judgment shall remain,
 "continue and be, as a further security to answer to the plaintiff
 "or plaintiffs, and his or their executors or administrators, such
 "damages as shall or may be sustained for further breach of any
 "covenant or covenants, in the same indenture, deed, or writing
 "contained; upon which the plaintiff or plaintiffs may have a
 "*scire facias* upon the said judgment, against the defendant, or
 "against his heir, terretenants, or his executors or administrators,
 "suggesting other breaches of the said covenants or agreements,
 "and to summon him or them respectively to shew cause, why
 "execution shall not be had or awarded upon the said judgment;
 "upon which there shall be the like proceeding as was in the
 "action of *debt* upon the said bond or obligation, for assessing
 "of damages, upon trial of issues joined upon such breaches, or
 "inquiry thereof upon a writ to be awarded in manner as aforesaid;
 "and that upon payment or satisfaction, in manner as aforesaid,
 "of such future damages, costs and charges as aforesaid, all fur-
 "ther proceedings on the said judgment are again to be stayed,
 "and so *toties quoties*, and the defendant, his body, lands, or goods,
 "shall be discharged out of execution as aforesaid."^a

But judgment to remain, to answer any further breach; and plaintiff may have a *scire facias* thereon, against the defendant, &c.

Writs of inquiry, under the above statute, to be executed before the sheriff, unless otherwise ordered.

The assessment of damages before a judge of assize or *nisi prius*, on breaches *suggested* under the above statute, being attended with great delay and expence to the parties, it was enacted by the statute 3 & 4 W. IV. c. 42. § 16. that "all writs issued under and
 "by virtue of the statute 8 & 9 W. III. c. 11. § 8. shall, unless

^a For the proceedings on this statute, breaches thereon, see Tidd *Prac.* 9 Ed. 363. 686. 1106.
 and the mode of *suggesting*, or *assigning*.

“ the court where such action is pending, or a judge of one of
 “ the superior courts, shall otherwise order, direct the sheriff of the
 “ county where the action shall be brought, to summon a jury to ap-
 “ pear before such sheriff, instead of the justices or justice of assize
 “ or *nisi prius* of that county, to inquire of the truth of the breaches
 “ suggested, and assess the damages that the plaintiff shall have
 “ sustained thereby; and shall command the said sheriff, to make
 “ return thereof to the court from whence the same shall issue, at a
 “ day certain, in term or in vacation, in such writ to be mentioned:
 “ and such proceedings shall be had, after the return of such writ,
 “ as are in the said statute in that behalf mentioned, in like man-
 “ ner as if such writ had been executed before a justice of assize
 “ or *nisi prius*.”

This statute is applicable to cases where breaches are *sug-
 gested* on the roll, after judgment for the plaintiff on demurrer, or by
 confession or *nihil dicit*, in an action upon bond, or on any penal
 sum, for non-performance of any covenants and agreements, in any
 indenture, deed, or writing contained; and does not seem to ex-
 tend to those, where the plaintiff *assigns* breaches of the condition of
 the bond, &c. in his declaration, or replication; and, an issue or
 issues being joined thereon, a *venire facias* is awarded, as well to
 try the issue or issues, as to assess damages upon the breaches
 assigned. But, in cases to which the statute applies, the plaintiff
 need not apply to the court or a judge, for leave to issue a writ to
 inquire of the truth of the breaches suggested, and assess the da-
 mages that he hath sustained thereby; but may, if he think fit,
 issue such writ as a matter of course, unless the court where the
 action is pending, or a judge of one of the superior courts, shall
 otherwise order, and proceed thereon to assess damages, according
 to the statute. For this purpose, the plaintiff is authorized, after
suggesting breaches on the roll ^a, to sue out a writ of inquiry, di-
 rected to the sheriff of the county where the action is brought;
 commanding him to summon a jury to appear before him, to in-
 quire, on their oath, of the truth of the breach or breaches sug-
 gested, and assess the damages which the plaintiff shall have sus-
 tained thereby; and that he make return thereof to the court, at a
 day certain, in term or vacation, to be mentioned therein ^b.

Construction of
 stat. 3 & 4 W.
 IV. c. 42. § 16.

In cases to
 which it applies,
 writ of inquiry
 may be issued as
 a matter of
 course, unless,
 &c.

Direction, and
 form of writ of
 inquiry.

^a Append. to Chap. XXII. § 5.

^b *Id.* § 6.

Signing and sealing.

Delivery of, to sheriff.

Delivery of copy to defendant.

Notice of inquiry.

Rule for judgment unnecessary, on writ of inquiry.

When costs may be taxed, &c.

The writ of inquiry is engrossed on parchment; and, in the King's Bench, it is sealed only; but, in the Common Pleas, it is signed by the prothonotaries, and afterwards sealed^a; and should be delivered to the sheriff, who will thereupon summon a jury for the execution of it. A copy of the writ should also, it seems, be delivered to the defendant, or his attorney^b; and, previously to its execution, a *notice* of inquiry^c should be given, in the usual way^d, to inquire of the truth of the breaches suggested, and to assess the damages which the plaintiff hath sustained thereby: and if either party propose to attend by counsel, he should give notice thereof to his adversary, or he will not be allowed for it in costs^e.

On the return day of the writ of inquiry, the plaintiff, in the King's Bench, must formerly have given a rule for judgment, with the clerk of the rules, which expired in *four* days^f: In the Common Pleas, there was no rule for judgment given on the return of the inquiry, but the plaintiff's attorney waited *four* days after the return day, inclusive of both days; after which, the inquisition being previously obtained from the sheriff, the prothonotaries would have taxed the costs thereon^g: And now, by a late rule of all the courts^h, "after the return of a writ of inquiry, judgment may be signed at the expiration of *four* days from such return, without any rule for judgment." At the expiration of that time, therefore, the sheriff having in the mean time made his return to the writ of inquiryⁱ, "costs may be taxed, judgment signed, "and execution issued forthwith; unless the sheriff or his "deputy, before whom the writ of inquiry was executed, shall "certify under his hand, upon such writ, that judgment ought "not to be signed, until the defendant shall have had an "opportunity to apply to the court for a new inquiry, or a "judge of any of the said courts shall think fit to order that judg-

^a Tidd *Prac.* 9 Ed. 574.

^b Gillingham v. Waskett, M'Clel. 568.
13 Price, 791. S. C.

^c Append. to Chap. XXII. § 7.

^d Tidd *Prac.* 9 Ed. 576.

^e *Id.* 580.

^f Clerk v. Rowland, 1 Salk. 399.

^g Imp. C. P. 7 Ed. 437. and see Tidd

Prac. 9 Ed. 581.

^h R. H. 2 W. IV. *reg.* 1. § 67. 8
Bing. 297, 8.

ⁱ Append. to Chap. XXII. § 8. and
for the entry of the return on the
roll, and final judgment thereon, see *id.*
§ 5.

"ment or execution shall be stayed, till a day to be named in such order". CH. XXII.

"Provided, that, all and every the provisions contained in the statute made and passed in the first year of the reign of his present majesty, intituled 'an act for the more speedy judgment and execution, in actions brought in his majesty's courts of law at Westminster, and in the court of Common Pleas of the county palatine of Lancaster, and for amending the law as to judgment on a *cognovit actionem* in cases of bankruptcy,' shall, so far as the same are applicable thereto, be extended and applied to judgments and executions upon such writs of inquiry, in like manner as if the same were expressly re-enacted therein." ^b

Provisions of stat. 1 W. IV. c. 7. to extend to such writs of inquiry.

^a Stat. 3 & 4 W. IV. c. 42. § 18.

^b *Id.* § 19. *Ante*, 131, 2.

CHAP. XXIV.

Of Changing the Venue, &c.

IN the King's Bench, the rule to change the venue is absolute in the first instance: In the Common Pleas and Exchequer, it was formerly only a rule to shew cause ^a: But, by a late rule of all the courts ^b, "in cases where the application for a rule to change the venue is made upon the usual *affidavit* only, the rule shall be absolute in the first instance; and the venue shall not be brought back, except upon an undertaking of the plaintiff to give material evidence in the county in which the venue was originally laid."

Rule to change venue.

Absolute in first instance.

^a Tidd *Prac.* 9 Ed. 608, 9. And as to the practice of changing, and bringing back, the venue in general, see *id.* 601, &c.

^b R. H. 2 W. IV. *reg.* 1. § 103. 8

Bing. 304. And for the form of the rule to change the venue thereon, in C. P. and Exchequer, see *Append.* to Chap. XXIV. § 1, 2.

When impartial trial cannot be had.

In local actions.

Power to direct local actions to be tried in any county.

When a fair and impartial trial cannot be had in the county where the venue is laid, the courts, on an *affidavit* of the circumstances, will change it in *transitory* actions^a; or, in *local* actions, would formerly have given leave to enter a *suggestion* on the roll, with a *nient dedire*, in order to have the trial in an adjoining county^b: and the parties by *consent* might have changed the venue in *local* actions^c; or have them tried out of their proper county, such consent being entered by suggestion on the roll^d. And now, by the late act for the further amendment of the law^e, &c. reciting that unnecessary delay and expence were sometimes occasioned by the trial of *local* actions in the county where the cause of action had arisen; it is enacted, that "in any action depending "in any of the superior courts of common law at *Westminster*, "the venue in which is by law *local*, the court in which such action shall be depending, or any judge of any of the said courts, "may, on the application of either party, order the issue to be "tried, or writ of inquiry to be executed, in any other county or "place than that in which the venue is laid; and for that purpose, "any such court or judge may order a *suggestion* to be entered on "the record, that the trial may be more conveniently had, or writ "of inquiry executed, in the county or place where the same is "ordered to take place."

^a *Mayor of Poole v. Bennet*, 2 Str. 874. *Mylock v. Saladine*, 3 Bur. 1564. 1 Blac. Rep. 480. S. C. but see *Foley v. Ld. Peterborough*, H. 25 Geo. III. K. B.

^b *Regina v. Delme*, 10 Mod. 198. *Biron v. Philips*, 1 Str. 235. *Rex v. Harris*, 3 Bur. 1334. *Rex v. Amery*,

1 Durnf. & E. 363.

^c *Mayor, &c. of Bristol v. Proctor*, 1 Wils. 298. *Groves v. Durall*, H. 38 Geo. III. K. B.

^d *Fonnerau v. Fonnerau*, in K. B. *per Cur.* and see *Tidd Prac.* 9 Ed. 605, 6.

^e 3 & 4 W. IV. c. 42. § 22. and see 3 Rep. C. L. Com. 14. 73.

CHAP. XXV.

Of BRINGING MONEY into COURT.

BY the common carriers' act ^a, "in all actions to be brought
"against any mail contractor, stage coach proprietor, or other
"common carrier for hire, for the loss of, or injury to any goods
"delivered to be carried, whether the value of such goods shall
"have been declared or not, it shall be lawful for the defendant or
"defendants to pay money into court, in the same manner, and with
"the same effect, as money may be paid into court in any other
"action." And, by the late act for the further amendment of the
law ^b, &c. "it shall be lawful for the defendant in all *personal*
"actions, (except actions for assault and battery, false imprison-
"ment, libel, slander, malicious arrest or prosecution, criminal
"conversation, or debauching of the plaintiff's daughter or ser-
"vant,) by leave of any of the superior courts of law at *Westmin-*
"ster, where such action is pending, or a judge of any of the said
"superior courts, to pay into court a sum of money, by way
"of compensation or amends, in such manner, and under such
"regulations, as to the payment of costs, and the form of plead-
"ing, as the said judges, or any *eight* or more of them, of whom
"the chief of each of the said courts shall be *three*, shall, by any
"rules or orders, by them to be from time to time made, order
"and direct."

In actions
against com-
mon carriers.

In all personal
actions, with
certain excep-
tions.

^a 11 Geo. IV. & 1 W. IV. c. 68. § 10. and see 2 Rep. C. L. Com. 52, &c.

sequences, see Tidd *Prac.* 9 Ed. 619, &c.
^b 3 & 4 W. IV. c. 42. § 21. and see 2 Rep. C. L. Com. 52. 97.

100.; and for the practice of bringing money into court in general, and its con-

CHAP. XXVI.

Of PLEAS in ABATEMENT, for NONJOINDER of PARTIES ; and MISNOMER.

In actions upon contracts, non-joinder of one of several partners, can only be pleaded in abatement.

In actions for wrongs, the non-joinder of other wrong-doers is not pleadable in abatement.

Case of common carriers.

By stat. 11 Geo. IV. & 1 W. IV. c. 68.

IN actions upon *contracts*, when there are *several* parties, the action should be brought by or against all of them, if living^a; or, if some are dead, by or against the survivors^b: But if an action be brought, upon a joint contract, against one of several partners, he can only plead in abatement; though the plaintiff knew, and even contracted with the other partners^c. In actions for *wrongs*, as they are of a joint and several nature, the plaintiff may proceed against all or any of the parties who committed them; and it is no plea in abatement^d, or ground of nonsuit^d, that there are other parties not named. In an action on the *case*, therefore, against a common carrier, for the loss of goods, or for not safely carrying a passenger, the defendant cannot plead in abatement the nonjoinder of a copartner^e. And, by the common carriers' act, 11 Geo. IV. & 1 W. IV. c. 68. § 5. "any one or more of several mail contractors, stage coach proprietors, or common carriers, shall be liable to be sued by his her or their name or names only; and no action or suit commenced to recover damages, for loss or injury to any parcel, package, or person, shall abate for the want of joining any co-proprietor or copartner in any mail, stage coach, or other public conveyance by land for hire."

^a 1 Wms. Saund. 5 Ed. 291. b. (4.)

^b 2 Wms. Saund. 5 Ed. 121. c. (1.) and see the cases referred to in Tidd *Prac.* 9 Ed. 6.

^c Darwent v. Walton, 2 Atk. 510. Rice v. Shute, 5 Bur. 2611. 2 Blac. Rep. 695. S. C. Abbot v. Smith, *id.* 947. and see Mitchell v. Tarbutt, 5 Durnf. & E. 649. 1 Wms. Saund. 5 Ed. 291. c. d. Tidd *Prac.* 9 Ed. 6.

^d Tidd *Prac.* 9 Ed. 9. 635.

^e Ansell v. Waterhouse, 6 Maule & S. 385. 2 Chit. R. 1. S. C. and see Mitchell v. Tarbutt, 5 Durnf. & E. 649. Govett v. Radnidge, 3 East, 62. Bretherton v. Wood, 6 Moore, 141. 3 Brod. & B. 54. 9 Price, 408. S. C. but see Buddle v. Willson, 6 Durnf. & E. 369. Powell v. Layton, 2 New Rep. C. P. 365. *semb. contra.* and see Tidd *Prac.* 9 Ed. 635, 6.

Also, by the late act for the further amendment of the law ^a, &c. "no plea in abatement, for the nonjoinder of any person as a co-defendant, shall be allowed in any court of common law, unless it shall be stated in such plea, that such person is resident within the jurisdiction of the court; and unless the place of residence of such person shall be stated, with convenient certainty, in an affidavit verifying such plea." And it having been holden, that joint contractors must all be sued, though one of them has become bankrupt, and obtained his certificate ^b, or if not, that the parties sued may plead in abatement ^b; it is further enacted, by the same statute ^c, that "to any plea in abatement, in any court of law, of the nonjoinder of another person, the plaintiff may reply that such person has been discharged by bankruptcy and certificate, or under an act for the relief of insolvent debtors."

Plea in abatement, for nonjoinder of a co-defendant, not to be allowed, unless he reside within the jurisdiction.

Plaintiff may reply to such plea, a discharge by certificate, &c.

By Lord *Tenterden's* act ^d, "if any defendant or defendants, in any action on any simple contract, shall plead any matter in abatement, to the effect that any other person or persons ought to be jointly sued, and issue be joined on such plea, and it shall appear at the trial, that the action could not, by reason of the therein recited acts ^e, or that act, or of either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same."

Effect of such plea, where the action is not maintainable against the persons named therein, for want of a written promise or acknowledgment, by stat. 9 Geo. IV. c. 14.

And, by the statute 3 & 4 W. IV. c. 42. ^f "in all cases in which, after such plea in abatement, the plaintiff shall, without having proceeded to trial upon an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, if it shall appear, by the pleadings in such subsequent action, or on the evidence at the trial thereof, that all the original defendants are liable, but that one or more of the persons named in such plea in abatement, or any subsequent plea in abatement, are not liable as a contracting party or parties, the plaintiff shall nevertheless be entitled to a judgment, or to a verdict and judg-

Where subsequent proceedings are had against the persons named therein.

^a 3 & 4 W. IV. c. 42. § 8. and see

^c § 9.

3 Rep. C. L. Com. 10, 11. 72.

^d 9 Geo. IV. c. 14. § 2.

^b *Bovill v. Wood*, 2 Maule & S. 23.

^e 21 Jac. I. c. 16. & Irish act 10 Car.

and see *Noke v. Ingham*, 1 Wils. 96.

I. sess. 2. c. 6.

Hawkins v. Ramsbottom, 6 Taunt. 179.

^f § 10.

CH. XXVI. "ment, as the case may be, against the other defendant or defendants, who shall appear to be liable; and every defendant who is not so liable, shall have judgment, and shall be entitled to his costs as against the plaintiff, who shall be allowed the same as costs in the cause against the defendant or defendants who shall have so pleaded in abatement the nonjoinder of such person: Provided, that any such defendant, who shall have so pleaded in abatement, shall be at liberty on the trial, to adduce evidence of the liability of the defendants named by him in such plea in abatement."

Misnomer not
pleadable in
abatement.

Before the late act for the further amendment of the law^a, &c. if the plaintiff had declared against the defendant by a wrong name, the latter, if not estopped, might have pleaded the *misnomer* in abatement^a: But now, by the above act^b, "no plea in abatement for a *misnomer*, shall be allowed in any *personal* action; but in all cases in which a *misnomer* would, but for that act, have been by law pleadable in abatement in such action, the defendant shall be at liberty to cause the declaration to be amended, at the costs of the plaintiff, by inserting the right name, upon a judge's summons, founded on an *affidavit* of the right name; and in case such *summons* shall be discharged, the costs of such application shall be paid by the party applying, if the judge shall think fit."

^a 3 & 4 W. IV. c. 42. and see 3 Rep. C. L. Com. 22, 3. 75, 6. Tidd Prac. 9 Ed. 686; and as to the *misnomer* of parties, and how taken advant-

age of, and when and how a mistake in their names was cured, and when not, see *id.* 447, 8, 9.

^b § 11.

CHAP. XXVII.

Of PLEAS in BAR.

BY the late act for the further amendment of the law^a, &c., reciting that "it would greatly contribute to the diminishing of expence in suits in the superior courts of common law at *Westminster*, if the pleadings therein were in some respects altered, and the questions to be tried by the jury left less at large than they then were, according to the course and practice of pleading in several forms of action; but this could not be conveniently done, otherwise than by rules and orders of the judges of the said courts, from time to time to be made; and doubts might arise, as to the power of the said judges to make such alterations, without the authority of parliament; it is enacted, that "the judges of the said superior courts, or any *eight* or more of them, of whom the chief of "each of the said courts shall be *three*, shall and may, by any rule or "order to be from time to time by them made, in term or vacation, at "any time within *five* years from the time when that act shall take "effect, make such alterations in the mode of pleading in the said "courts, and in the mode of entering and transcribing pleadings, "judgments, and other proceedings, in actions at law, and such regulations, as to the payment of costs and otherwise, for carrying "into effect the said alterations, as to them may seem expedient; "and all such rules, orders or regulations, shall be laid before both "houses of parliament, if parliament be then sitting, immediately upon the making of the same; or if parliament be not "sitting, then within *five* days after the next meeting thereof; and "no such rule, order, or regulation, shall have effect, until *six* weeks "after the same shall have been so laid before both houses of parliament; and any rule or order so made shall, from and after "such time aforesaid, be binding and obligatory on the said courts,

Preamble to
stat. 3 & 4 W.
IV. c. 42.

Judges to have
power to make
alterations in the
mode of plead-
ing, &c. in the
superior courts.

^a 3 & 4 W. IV. c. 42. § 1. and see
2 Rep. C. L. Com. 44, &c. 89, &c.;
and as to pleas in bar, in actions upon
contracts, see Tidd Prac. 9 Ed. 643,
&c.; and in actions for wrongs, *id.* 645,

6: and when the general issue is proper,
and what may be given in evidence under
it, or must be pleaded specially, *id.*
646, &c.

But not so as to deprive any person of the power of pleading the general issue, given by any statute.

“ and all other courts of common law, and on all courts of error, “ into which the judgments of the said courts, or any of them, shall “ be carried by any writ of error, and be of the like force and effect, “ as if the provisions contained therein, had been expressly enacted “ by parliament: Provided always, that no such rule or order “ shall have the effect of depriving any person of the power of “ pleading the general issue, and giving the special matter in evi- “ dence, in any case wherein he is now, or hereafter shall be entitled “ to do so, by virtue of any act of parliament now or hereafter to “ be in force.”

CHAP. XXIX.

Of AMENDMENT of FINES and RECOVERIES, and VARIANCES.

Amendments at common law, or by statute.

Of fines and recoveries.

AMENDMENTS are either at common law or by statute^a: and, when the amendment is by statute, it is a general rule, that there must be something to amend by. In compliance with this rule, it was holden, that fines and recoveries, being considered as common assurances, might be amended by the court of Common Pleas, when they had sufficient authority, so as to effectuate the intention of the parties. The ground upon which the court proceeded, in making these amendments, was the statute 8 Hen. VI. c. 12, which authorized them to amend the *misprision* of the clerk; and as the *præcipe* was the cursitor's instruction for an *original* writ, so a deed to lead or declare the uses was considered as his instruction for a fine or recovery^b. But fines and recoveries being abolished by the statute 3 & 4 W. IV. c. 74. there is a clause therein^c, that

^a *Phillips v. Smith*, 1 Str. 137. And for the law and practice of amendment in general, and what is or is not amendable in particular cases, at common law or by statute; and when, how, and on what terms, the amendment is made, see *Tidd Prac.* 9 Ed. 696, &c. 712, &c.

^b *Loggin*, demandant; *Rawlins*, tenant; *Barnea*, 22. and for the cases in which fines and recoveries were, or were not amendable, before the statute 3 & 4 W. IV. c. 74, see *Tidd Prac.* 9 Ed. 699. 701.

^c § 7.

"if it shall be apparent, from the deed declaring the uses of any fine already levied, or hereafter to be levied, that there is in the indentures, record, or any of the proceedings of such fine, any error in the name of the conusor or conusee of such fine, or any misdescription or omission of lands intended to have been passed by such fine, then and in every such case the fine, without any amendment of the indentures, record, or proceedings, in which such error, misdescription, or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done, if there had been no such error, misdescription, or omission."

Fines made valid, without amendment.

And, by another clause of the same statute ^a, "if it shall be apparent, from the deed making the tenant to the writ of entry, or other writ for suffering a common recovery, already suffered, or hereafter to be suffered, that there is in the exemplification, record, or any of the proceedings of such recovery, any error in the name of the tenant, demandant, or vouchee in such recovery, or any misdescription or omission of lands intended to have been passed by such recovery, then and in every such case the recovery, without any amendment of the exemplification, record, or proceedings in which such error, misdescription, or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done, if there had been no such error, misdescription, or omission."

Recoveries made valid, without amendment.

Previously to Lord *Tenterden's* act ^b, great expence was often incurred, and delay or failure of justice took place at trials, by reason of *variances* between *writings* produced in evidence, and the recital or setting forth thereof upon the *record* on which the trial was had, in matters not material to the merits of the case; and such record could not in any case have been amended at the trial, and in some cases could not be amended at any time ^c: for remedy

Variances not amendable at trial, &c. before stat. 9 Geo. IV. c. 15.

^a § 8.

^b 9 Geo. IV. c. 15.

^c Preamble to stat. 9 Geo. IV. c. 15. and for cases of *variance* between the de-

claration, or subsequent pleadings, and the evidence given at the trial of personal actions, &c.; and in what cases they have been holden to be fatal, and in what in-

Amendable by that statute, in cases where a variance shall appear between written or printed evidence and the record, on payment of costs.

Order for amendment to be indorsed on *postea*.

Decisions thereon.

whereof it was enacted, by the above statute, that "it shall and
" may be lawful for every court of record holding plea in civil
" actions, any judge sitting at *nisi prius*, and any court of *oyer*
" and *terminer* and general gaol delivery, in *England, Wales*, the
" town of *Berwick upon Tweed*, and *Ireland*, if such court or
" judge shall see fit so to do, to cause the record, on which any
" trial may be pending before any such judge or court, in any civil
" action, or in any indictment or information for any misde-
" meanour, where any variance shall appear between any matter
" in *writing* or in *print* produced in evidence, and the recital or
" setting forth thereof upon the *record* whereon the trial is pend-
" ing, to be forthwith amended in such particular, by some officer
" of the court, on payment of such costs, if any, to the other party,
" as such judge or court shall think reasonable; and thereupon
" the trial shall proceed, as if no such variance had appeared; and
" in case such trial shall be had at *nisi prius*, the order for the
" amendment shall be indorsed on the *postea*, and returned,
" together with the record; and thereupon the papers, rolls, and
" other records of the court from which such record issued shall
" be amended accordingly."

This statute, which authorizes a judge to order amendments of variances between written or printed evidence and the record, invests him with a discretion, which cannot, it seems, be revised by the court above^a. And where a judgment was stated on the record as in one court, and it appeared, by the production of an examined copy, to have been obtained in another, the judge at *nisi prius* ordered the record to be amended^b. So where, in a declaration on a bill of exchange, the date of the bill was stated to be the 26th of *March*, when it really was the 29th, the judge, in an undefended cause, allowed the variance to be amended, under the above statute, without the payment of any costs^c. And where, in an action against a defendant for not obeying a *subpœna*, the declaration stated, that the plaintiff caused to be left with the defendant, a *copy of the writ of subpœna*, the court of Common Pleas held that a judge at *nisi prius* had authority, under the above sta-

material, see Tidd *Prac.* 9 Ed. 434, 5. (f.) & 1st Sup. thereto, 96, 9; and see further as to *variance*, 1 Chit. Pl. 5. Ed. 278, &c. 3 Stark. Evid. 1 Ed. 1526, &c.

^a *Parks v. Edge*, 1 Crompt. & M. 429.

Parker v. Ade, 1 Dowl. Rep. 643. S. C.

^b *Briant v. Eicke*, 1 Moody & M. 359. per Ld. *Tenterden*, Ch. J.

^c *Bentzing v. Scott*, 4 Car. & P. 24. per *Park, J.*

tute, to allow this allegation to be amended as follows: "a copy CH. XXIX. of so much of the said writ of subpoena as related to the said defendant."^a So, in an action on a bill of exchange by indorsee against indorser, where the bill was stated to have been drawn payable to the drawer's order, and by him indorsed to *A. B.*, whereas it appeared in evidence to have been drawn in favour of *A. B.* the judge having amended the record, the court of Exchequer approved of it^b. And a record may be amended, pending the trial, by correcting a variance between a written contract and the statement of the contract on the pleadings, although it do not appear by the record, that the contract was in writing^c. But where, in an action for a malicious arrest, the plaintiff alleged that "the defendants did not prosecute the suit complained of, but therein failed and made default, and their pledges were in mercy, &c."; this was holden not to be such an error in the record, as could be amended at *nisi prius*, under the above statute; it not being a mere mistake in setting out a written instrument, but an allegation of something totally different from the proof^d. So, in *replevin*, where the defendant, in his avowry, stated that the distress was for rent in arrear, and that the plaintiff held the lands on certain terms, but, on the plaintiff's lease being put in, it appeared that he held them on other and different terms, the judge at *nisi prius* ruled that this variance was not amendable, under the statute 9 Geo. IV. c. 15^e; and also, that the act only applies to cases where some particular written instrument is professed to be set out or recited in the pleading^f: And the judge, in another case, would not allow an amendment, under the above statute, when there was a variance which would not have occurred, if common care had been used in drawing the declaration^g.

The above statute being confined to such variances only as appeared between any matter in *writing* or in *print* produced in evidence, and the recital or setting forth thereof on the *record* whereon the trial is pending, was extended by the statute 3 & 4 W. IV. Stat. 9 Geo. IV. c. 15. extended by 3 & 4 W. IV. c. 42.

^a *Masterman v. Judson*, 8 Bing. 224. *den*, Ch. J.

^b *Parks v. Edge*, 1 Crompt. & M. 429. ^c *Ryder v. Malbon*, 3 Car. & P. 594. *Parker v. Ade*, 1 Dowl. Rep. 643. S. C. *per Park, J.*

^d *Lamey v. Bishop*, 1 Nev. & M. 332. ^e *Jelf v. Oriel*, 4 Car. & P. 22. *per* *Ld. Tenterden*, Ch. J.; but see *Parks v.*

^f *Webb v. Hill*, 1 Moody & M. 258. *Edge*, 1 Crompt. & M. 429. *Parker v.* ^g *3 Car. & P. 485. S. C. per Ld. Tenter-* *Ade*, 1 Dowl. Rep. 643. S. C.

Preamble to
latter statute.

Amendments
may be made,
when any va-
riance appears
between the
proof, and re-
cital or setting
forth on the re-
cord, of any con-
tract, &c. in any
particular not
material to the
merits of the
case, and by
which the oppo-
site party cannot
have been pre-
judiced.

Terms of
amendment.

c. 42.^a; whereby, after reciting that great expence was often incurred, and delay or failure of justice took place at trials, by reason of *vacancies*^b, as to some particular or particulars, between the *proof* and the *record*, or setting forth on the record, or document on which the trial was had, of contracts, customs, prescriptions, names, and other matters or circumstances, not material to the merits of the case, and by the mis-statement of which the opposite party could not have been prejudiced, and the same could not in any case be amended at the trial, except where the variance was between any matter in *writing* or in *print* produced in evidence, and the *record*; and that it was expedient to allow such amendments as thereafter mentioned, to be made on the trial of the cause^c; it is enacted, that "it shall be lawful for any court of record holding
"plea in civil actions, and any judge sitting at *nisi prius*, if such
"court or judge shall see fit so to do, to cause the record, writ or
"document, on which any trial may be pending before any such
"court or judge, in any civil action, or in any information in the
"nature of a *quo warranto*, or proceedings on a *mandamus*, when
"any variance shall appear between the proof, and the recital or
"setting forth on the record, writ or document, on which the trial
"is proceeding, of any contract, custom, prescription, name, or
"other matter, in any particular or particulars in the judgment of
"such court or judge not material to the merits of the case, and
"by which the opposite party cannot have been prejudiced in the
"conduct of his action, prosecution, or defence, to be forthwith
"amended by some officer of the court or otherwise, both in the
"part of the pleadings where such variance occurs, and in every
"other part of the pleadings, which it may become necessary to
"amend, on such terms, as to payment of costs to the other party,
"or postponing the trial to be had before the same or another jury,
"or both payment of costs and postponement, as such court or
"judge shall think reasonable; and in case such variance shall be
"in some particular or particulars in the judgment of such court
"or judge not material to the merits of the case, but such as that
"the opposite party may have been prejudiced thereby in the con-
"duct of his action, prosecution, or defence, then such court or
"judge shall have power to cause the same to be amended, upon

^a § 23. and see 2 Rep. C. L. Com. *variances*.
35, &c. 85, &c.

^c Preamble to stat. 3 & 4 W. IV. c.

^b This is evidently a misprint, for "va- 42. § 23.

“ payment of costs to the other party, and withdrawing the record, CH. XXIX.
 “ or postponing the trial as aforesaid, as such court or judge shall
 “ think reasonable ; and after any such amendment, the trial shall
 “ proceed, in case the same shall be proceeded with, in the same
 “ manner in all respects, both with respect to the liability of
 “ witnesses to be indicted for perjury and otherwise, as if no such
 “ variance had appeared ; and in case such trial shall be had at
 “ *nisi prius*, or by virtue of such writ as aforesaid, the order for
 “ the amendment shall be indorsed on the *postea* or the writ, as
 “ the case may be, and returned, together with the record or writ,
 “ and thereupon such papers, rolls, and other records of the court
 “ from which such record or writ issued, as it may be necessary to
 “ amend, shall be amended accordingly ; and in case the trial shall
 “ be had in any court of record, then the order for amendment
 “ shall be entered on the roll, or other document, upon which the
 “ trial shall be had : provided, that it shall be lawful for any party
 “ who is dissatisfied with the decision of such judge at *nisi prius*,
 “ sheriff, or other officer, respecting his allowance of any such
 “ amendment, to apply to the court from which such record or writ
 “ issued, for a new trial upon that ground ; and in case any such
 “ court shall think such amendment improper, a new trial shall be
 “ granted accordingly, on such terms as the court shall think fit,
 “ or the court shall make such other order as to them may seem
 “ meet.”

Trial to proceed, after amendment, as if no variance had appeared.

Order for amendment to be indorsed on *postea*, and entered on roll.

Party dissatisfied with decision of judge, may apply to court for a new trial.

And it is thereby further enacted, that “ the said court or judge
 “ shall and may, if they or he think fit, in all such cases of
 “ *variance*, instead of causing the record or document to be
 “ amended as aforesaid, direct the jury to find the fact or facts
 “ according to the evidence ; and thereupon such finding shall be
 “ stated on such record or document, and notwithstanding the find-
 “ ing on the issue joined, the said court, or the court from which
 “ the record has issued, shall, if they shall think the said variance
 “ immaterial to the merits of the case, and the mis-statement such
 “ as could not have prejudiced the opposite party in the conduct
 “ of the action or defence, give judgment according to the very
 “ right and justice of the case.”^a

Power for court or judge to direct facts to be found specially.

^a Stat. 3 & 4 W. IV. c. 42. § 24.

CHAP. XXX.

Of the ISSUE.

Issue, what. **AN** *issue* is defined to be a single, certain, and material point, issuing out of the allegations or pleadings of the plaintiff and defendant^a; but it more commonly signifies the entry of the allegations or pleadings themselves: and it is either in *law*, upon a demurrer, or in *fact*, which is triable by the court upon *nul tiel record*, or by a jury upon pleadings concluding to the country^b.

Contents of, before stat. 2 W. IV. c. 39. The issue contains an entry or transcript of the declaration, and other subsequent pleadings; and, in actions by *bill* in the King's Bench, it was formerly made up of the term in which it was joined^c; and was prefaced in that court with a *memorandum*, stating the exhibiting of the bill, and that there were pledges for the prosecution of it^d. The reason for a *memorandum* was, that proceedings by *bill* were formerly considered as the bye business of the court^e; and it varied in *four* cases; 1st. when the issue was of the same term in which the cause of action accrued; secondly, when it was of a term subsequent to the cause of action, but of the same term with the declaration; thirdly, when it was of a term subsequent to the declaration, and within *four* terms after; fourthly, when it was more than *four* terms after the declaration. In the first case, the *memorandum* was special, stating the bill to have been exhibited on a particular day in term, after the cause of action accrued; in the second case, it stated the bill to have been exhibited on the first day of the term in which the declaration was delivered; in the third and fourth cases, it pursued the fact, but with this difference, that in the third case, the term of exhibiting the bill was referred

^a Co. Lit. 126. a.

^b Tidd *Prac.* 9 Ed. 717. and as to the mode of making up, and entering the issue, before stat. 2 W. IV. c. 39. see *id.* Chap. XXX.

^c Wood v. Miller, 3 East, 204.

^d Append. to Tidd *Prac.* 9 Ed. Chap.

XXX. § 1, &c. The pledges to prosecute, however, are now discontinued, in consequence of the rule of Mich. 3 W. IV. reg. 15. 9 Bing. 448. *Ante*, 122.

^e Gilb. C. P. 47.

to as *last* past; and in the fourth, as in a certain year of the king's reign^a. In actions by *original* in the King's Bench, the clerk of the papers made up the issue, or paper book, of the same term with the declaration^b; or it might have been entitled of the term issue was joined, as in actions by *bill*^c: and it began with a copy of the declaration, without a *memorandum*^d. In the Common Pleas, the issue was entitled of the term in which it was joined^e, and made up in the same manner as in the King's Bench by *original*. In the Exchequer, the issue began with a *placita* or stile of the court, of the term it was joined; and when the issue was of the same term with the declaration, it merely contained a transcript of the pleadings, after the *placita*, beginning each with a new line, without any *memorandum* or imparlance; but when the issue was of a subsequent term, a *memorandum* was prefixed to the declaration, and the entry of an imparlance to the plea^f.

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As the distinction, however, between proceedings by *bill* and *original* writ, is abolished by the statute 2 W. IV. c. 39.^g, and a new and uniform mode of commencing declarations in personal actions is given by a rule of court^h, made in pursuance thereof, and the proceedings are, in consequence of that statute, no longer governed by *terms*, but may be carried on, except at certain times, in term or *vacation*ⁱ, the form of the *issue* is varied accordingly; and, when it is of the *same* term with the declaration, begins with the term in which, or in the vacation of which, the declaration was delivered or filed^k; and then proceeds with a transcript or copy of the declaration and subsequent pleadings, in the *present* tense; or, if the issue be of a *subsequent* term, after mentioning the term in or of which it is joined, it states, in the *past* tense, that the plaintiff, on the day on which the declaration was delivered or filed, complained of the defendant, &c. as follows: (*copying the declaration, and pleadings*^l). When the plea is of a term subsequent

Since that statute.

When it is of same term with declaration.

Of a subsequent term.

When plea is of

^a 1 Wms. Saund. 5 Ed. 40. (1.) 2 Wms. Saund. 5 Ed. 1. (1.) and see Tidd Prac. 9 Ed. 718.

^b Imp. K. B. 10 Ed. 530.

^c *Id.* (a.) 279.

^d Append. to Tidd Prac. 9 Ed. Chap. XXX. § 3.

^e Imp. C. P. 7 Ed. 310. Append. to Tidd Prac. 9 Ed. Chap. XXX. § 5.

^f Append. to Tidd Prac. 9 Ed. Chap. XXX. § 6.

^g *Ante*, 61.

^h R. M. 3 W. IV. reg. 15. 9 Bing. 447, 8. *Ante*, 121, 2.

ⁱ *Ante*, 100.

^k Append. to Chap. XXX. § 1.

^l *Id.* § 2.

a term subsequent to declaration.

Award of venire facias.

to the declaration, a general *imparlance* is sometimes introduced, at the head of the plea, similar to that which was formerly used in actions by *bill*, in the King's Bench^a; but this seems to be unnecessary: and, by a general rule of all the courts^b, it is not necessary that imparlances should be entered on any distinct roll. The issue concludes with an award of the *venire facias*^c; which, by a late statute^d, is to be made returnable forthwith.

^a Tidd *Prac.* 9 Ed. 720. Append. thereto, Chap. XXX. § 2.

^b R. H. 2 W. IV. reg. 1. § 109. 8 Bing. 805. 2 Sup. to Tidd *Prac.* 9 Ed. 74, 5.

^c As to the award of the *venire facias* in K. B. by *bill*, see Tidd *Prac.* 9 Ed. 720; by *original*, *id.* 722, 3; and in C. P. *id.* 723.

^d 3 & 4 W. IV. c. 67. § 2.

CHAP. XXXIII.

Of the TRIAL of ISSUES before the SHERIFF, &c. and SPECIAL CASES, on STATUTE 3 & 4 W. IV. c. 42.

Bower to direct issues joined in certain actions, to be tried before sheriff, or judge of court of record for recovery of debt.

BEFORE the statute 3 & 4 W. IV. c. 42., trials by the country were at *bar* or *nisi prius* only^a: But now, by the above statute^b, it is enacted, that "in any action depending in any of the superior courts of common law at *Westminster*, for any debt or demand "in which the sum sought to be recovered, and indorsed on the "writ of *summons*, shall not exceed *twenty* pounds, it shall be lawful for the court in which such suit shall be depending, or any "judge of any of the said courts, if such court or judge shall be "satisfied that the trial will not involve any difficult question of "fact or law, and such court or judge shall think fit so to do, to "order and direct that the issue or issues joined shall be tried before the sheriff of the county where the action is brought, or

^a As to trials at *bar*, see Tidd *Prac.* 9 Ed. 747; and as to trials at *nisi prius*, and the steps preparatory thereto, and

consequences of not proceeding to trial, &c. see *id.* 751, &c.

^b § 17.

" any judge of any court of record for the recovery of debt in such county ; and for that purpose a writ shall issue, directed to such sheriff^a, commanding him to try such issue or issues, by a jury to be summoned by him, and to return such writ, with the finding of the jury thereon indorsed, at a day certain, in term or in vacation, to be named in such writ ; and thereupon such sheriff, or judge, shall summon a jury, and shall proceed to try such issue or issues."

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This statute is confined to actions for the recovery of *debts* or demands, in which the sum sought to be recovered, and indorsed on the writ of *summons*, shall not exceed *twenty* pounds. And, in such actions, if the court in which the suit is depending, or any judge of a superior court, is satisfied, upon hearing counsel, or the attorneys or agents for both parties, that the sum sought to be recovered does not exceed that amount, and that the trial will not involve any difficult question of fact or law, they will make a rule or order^b, for trial of the issue or issues joined therein, before the sheriff of the county where the action is brought, or any judge of a court of record for the recovery of debt in such county ; and that a writ issue, directed to such sheriff or judge, for trial thereof accordingly. This rule or order will authorize the plaintiff, or his attorney, to issue a writ, which is called a writ of *trial*^c, directed to the sheriff, or judge, before whom the trial is to be had ; and, when directed to the sheriff, it begins by stating that the plaintiff had impleaded the defendant, in the court from which it issued, in an action on promises, (or of *debt*, &c. *as the case may be*;) and after setting forth the declaration, plea, and issue or issues joined, and that the sum sought to be recovered, and indorsed on the writ of *summons*, does not exceed 20*l.*, and that it is fitting that the issue or issues should be tried before the sheriff to whom it is directed, commands the said sheriff, that he summon twelve free and lawful men of his county, qualified according to law, who are nowise akin to the plaintiff or to the defendant, who shall be sworn truly to try the issue or issues joined between the parties ; and that the sheriff proceed to try such issue or issues accordingly, and when the same shall have been tried in manner aforesaid, that he make known to the court

Construction of
stat. 3 & 4 W.
IV. c. 42. § 17.
and proceedings
thereon.

Rule or order
for trial of
issues.

Direction, and
form of writ of
trial.

^a The words "or judge" seem to have been here inadvertently omitted.

^b Append. to Chap. XXXIII. § 1.

^c *Id.* § 2.

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XXXIII.Signing and
sealing, &c.Delivery of writ
to sheriff, and
indorsement
thereon.

Notice of trial.

Effect of verdict.

Sheriff, or judge,
to have the like
powers as judges
at *nisi prius*.At return of
writ, costs to be
taxed, and judg-
ment signed, &c.

what shall have been done by virtue of the writ, with the finding of the jury thereon indorsed, on the return day, that judgment may be given thereupon.

The writ of trial is engrossed on parchment; and signed, sealed, and issued, in like manner as the writ of inquiry in ordinary cases^a; and should be delivered to the sheriff, *two* clear days at least before the time appointed for its execution, folded up, and indorsed with a statement of the court in which the action is brought, the names of the parties, nature of the writ, and time and place when and where the issues are to be tried, specifying the hour of the sitting of the court *precisely*^b; and the sheriff will thereupon summon a jury, for the execution of the writ. Previously to its execution, however, a *notice* of trial^c should be given to the defendant, if he appear in person, or otherwise to his attorney; which should, it seems, be such a notice as he would have been entitled to, in case the issue or issues were to be tried before a judge at *nisi prius*. This notice should state the hour of the sitting of the court *precisely*, as indorsed on the writ^c; and, before it is given, the hour should be settled at the sheriff's office, to prevent the inconvenience of detaining the jury for a considerable time, with the uncertainty of the appearance of the parties: and if either party propose to attend by counsel, he should give notice thereof to his adversary, or he will not be allowed for it in costs.

The verdict of the jury, on the trial of such issue or issues, is declared by the act^d, to be "as valid, and of the like force, as a verdict of a jury at *nisi prius*; and the sheriff or his deputy, or judge, presiding at the trial of such issue or issues, shall have the like powers with respect to amendment on such trial, as are thereafter given to judges at *nisi prius*." And, "at the return of such writ^e, costs shall be taxed, judgment signed, and execution issued forthwith, unless the sheriff, deputy, or judge, before whom such trial shall be had, shall certify^f, under his hand, upon such writ, that judgment ought not to be signed, until the defendant shall have had an opportunity to apply to the court for a new trial, or a judge of any of the said courts shall think fit to

^a *Ante*, 136.^b Append. to Chap. XXXIII. § 8.^c *Id.* § 4. and as to the notice of trial, see *Tidd Prac.* 9 Ed. 753.^d Stat. 3 & 4 W. IV. c. 42. § 18.^e For the form of the sheriff's return to a writ of trial in *assumpsit*, see Append. to Chap. XXXIII. § 5; and in *debt*, *id.* § 6.^f Append. to Chap. XXII. § 1, 2.

"order" that judgment or execution shall be stayed, until a day to "be named in such order."^b The plaintiff, however, must, it seems, wait *four* days after the return day of the writ, before he can tax his costs, or sign judgment, &c.

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Provided, that "all and every the provisions contained in the "statute made and passed in the first year of the reign of his present majesty, intituled, An act for the more speedy judgment and execution, in actions brought in his majesty's courts of law at Westminster, and in the court of Common Pleas of the county palatine of Lancaster, and for amending the law as to judgment on a *cognovit actionem*, in cases of bankruptcy^c, shall, so far as the same are applicable thereto, be extended and applied to judgments and executions upon such writs for the trials of issues, in like manner as if the same were expressly re-enacted therein."

Provisions of
stat. 1 W. IV.
c. 7. to extend
to such issues.

In entering the proceedings on the roll, the rule or order of the court or judge should be stated, as a foundation for the award of the writ of *trial*^d; and the sheriff's return thereto should be entered, to authorize the judgment: but this need not be done, before the issuing of the writ of execution.

Entry of proceedings.

It sometimes happens, that the controversy turns entirely upon a matter of law; and the parties, being agreed as to the facts of the case, are desirous to take the opinion of the court upon it, without carrying the cause down to trial; and with a view to this object, it is enacted by the statute 3 & 4 W. IV. c. 42.^e that "it shall be lawful for the parties, in any action or information, after issue joined, by consent, and by order of any of the judges of the said superior courts, to state the facts of the case, in the form of a *special case*, for the opinion of the court; and to agree that a judgment shall be entered for the plaintiff or defendant, by confession or *nolle prosequi*, immediately after the decision of the case, or otherwise as the court may think fit; and judgment shall be entered accordingly."

Power to state
special case,
without proceeding
to trial.

^a Append. to Chap. XXII. § 3, 4.

^b Stat. 3 & 4 W. IV. c. 42. § 18.

^c Stat. 1 W. IV. c. 7. *Ante*, 181, 2.

^d Append. to Chap. XXXIII. § 7, 8.

^e § 25. and see 2 Rep. C. L. Com. 50, 51. 90. And as to special cases in general, how drawn, and the proceedings thereon, see *Tidd Prac.* 9 Ed. 698.

CHAP. XXXIV.

Of the TESTE and RETURN of JURY PROCESS; and COSTS of SPECIAL JURY, on a NONSUIT.

Teste and return
of *venire facias*,
&c.

THE writ of *venire facias juratores*, being the first process for convening a jury, was formerly *tested* on the first day of the term, in or after which the cause was to be tried; and was made *returnable* on some day before the trial, being a *general* return day or day *certain*, according to the previous proceedings: If in a country cause, the *venire* by *original* was made returnable on the last general return day, or, if by *bill*, on the last day of the term before the assizes; and the *distringas*, or *habeas corpora*, was tested on the *quarto die post* of the return by *original*, or by *bill* on the return of the *venire*; and made returnable on the first general return day or day certain, in term time, after the trial^a. But, by the statute 3 & 4 W. IV. c. 67.^b, reciting that by the existing law, and the practice of the courts of common law at *Westminster*, actions may be brought, and issues proceed to trial and final judgment, in *vacation*, notwithstanding the cause of action may have arisen subsequent to the then preceding term, and jury process was by law tested in *term* time only; it is enacted, that “from and after the passing “of that act, the writ of *venire facias juratores* may be *tested* on “the day on which the same shall be issued, and be made *returnable* forthwith; and that the writ of *distringas juratores*, or *habeas corpora juratorum*, may be *tested* in *term* or *vacation*, on a day “subsequent to the *teste* of the writ of *venire facias juratores*: Provided always, that when any trial is to be had at *bar*, the writ of “*venire facias juratores* shall be made returnable as heretofore.”

Costs of special
jury.

It was formerly holden, that the fees for *striking* a special jury, should be paid by the party applying for it; but that the other expences of the trial should abide the event of the suit^c: But, by

^a Tidd *Prac.* 9 Ed. 781. And as to jury process in general, see *id.* 777.; the qualification, disqualification, and exemption of jurors, *id.* 782; the mode of returning common juries, *id.* 785; and of striking special juries, *id.* 787.

^b § 2.

^c Say. *Costs*, 181. *Hamelton v. Style*, and *Wilks v. Eames*, 2 Str. 1080. *Eyles v. Smart*, Cas. Pr. C. P. 138. *Barnes*, 123. S. C. and see Tidd *Prac.* 9 Ed. 792.

the statute 6 Geo. IV. c. 50. "the person or party who shall apply
 "for a special jury, shall pay the fees for *striking* such jury, and
 "all the expences occasioned by the trial of the cause by the same;
 "and shall not have any further or other allowance for the same,
 "upon taxation of costs, than such person or party would be en-
 "titled unto, in case the cause had been tried by a common jury;
 "unless the judge, before whom the cause is tried, shall, imme-
 "diately after the *verdict*, certify under his hand, upon the back of
 "the record, that the same was a cause proper to be tried by a
 "special jury." This provision, however, did not apply to
 cases in which the plaintiff had been *nonsuited*^a: and it being deemed
 expedient that the judge should have such power of certifying,
 as well when a plaintiff is *nonsuited*, as when he has a *verdict*
 against him; it is enacted by the statute 3 & 4 W. IV. c. 42.^b, that
 "the said provision of the said last-mentioned act of parliament,
 "and every thing therein contained, shall apply to cases in which
 "the plaintiff shall be *nonsuited*, as well as to cases in which a
 "*verdict* shall pass against him."

By stat. 6 Geo.
IV. c. 50.

By stat. 3 & 4
W. IV. c. 42.

^a Wood v. Grimwood, 10 Barn. & C. 689, 699.

^b § 35.

CHAP. XXXV.

Of the EXAMINATION of WITNESSES on INTERROGATORIES, &c.; the ADMISSION of WRITTEN or PRINTED DOCUMENTS, &c.; and ADMISSIBILITY of INTERESTED WITNESSES.

Witnesses could not formerly have been examined on interrogatories, &c. without consent of parties.

BEFORE the statute 1 W. IV. c. 22. great difficulties were often experienced, from the impossibility of obtaining the personal attendance of witnesses at the trial. Sometimes it was found, that they were unable to attend, by reason of absence in foreign countries; sometimes, by reason of dangerous illness, or permanent infirmity. To prevent a failure of justice from any of these circumstances, the courts of law frequently availed themselves of the opportunity which an application for some indulgence afforded, to obtain, as a condition, the *consent* of a party to an examination of such witnesses, previously to the trial, upon *interrogatories*, before an officer of the court, or before commissioners; and the courts, in proper cases, would restrain a plaintiff from proceeding to trial, until he consented to a *commission* for examining material witnesses residing abroad: But when the courts of law had not the opportunity of compelling the *consent* of parties by such indirect means, recourse must have been had to a court of equity, where a new suit must have been instituted for the purpose, as auxiliary to the suit at law^a.

Writ, in nature of *mandamus* or commission, to examine witnesses in *India*, by stat. 13 Geo. III. c. 63. § 44.

These inconveniences were in part remedied by the statute 13 Geo. III. c. 63.^b; which enacted, that “when and as often as the *East India* company, or any person or persons, should commence or prosecute any action or suit, in law or equity, for which cause had arisen in *India*, against any other person or persons, in any of his Majesty’s courts at *Westminster*, it should and might be lawful for such courts respectively, upon motion there to be made, to provide and award such writ or writs, in the nature of a *mandamus* or commission, as therein mentioned, for the

^a 2 Rep. C. L. Com. 23, 4. 73, &c.

^b § 44.

“ examination of witnesses ; and such examination being duly re- CH. XXXV.
 “ turned, should be allowed and read, and should be deemed good
 “ and competent evidence, at any trial or hearing between the par-
 “ ties in such cause or action.”^a

Upon this statute, writs were granted in several cases, by the court of King’s Bench^b; and, in one of them^c, the motion being made on the last day of term, the court awarded such writ, even before issue joined. And the court of Common Pleas granted a *mandamus* to a court in *India*, to examine witnesses on behalf of the *defendant* in a civil action^d. Where a defendant, at his own expence, had obtained a writ of *mandamus*, under the above statute, for examining witnesses in *India*, and depositions were returned, and filed at the secondaries office of the Common Pleas; the court held, that the plaintiff was entitled to copies of them, on payment of the charges for making such copies, although he had not attended in court in *India*, either by his agent or counsel^e. And where a *mandamus* was granted for the defendant to examine witnesses in *India*, the plaintiff, having obtained a verdict, was holden to be entitled to his costs of cross examining such witnesses^f. But where the plaintiff had applied for and obtained such writ, which was returned, with the depositions, to this country, but the defendants did not join in the application for the writ, nor examine or cross examine witnesses under it, and the plaintiffs obtained a verdict;

Writs granted upon this statute, and decisions thereon.

^a For the form of a rule for the examination of witnesses in *India*, on this statute, before 1 W. IV. c. 22, see Appendix to Tidd *Prac.* 9 Ed. Chap. XXXV. § 26; for the affidavit in support thereof, *id.* § 25; and for the *mandamus* thereon, *id.* § 27: and see the statutes 24 Geo. III. c. 25, for establishing a court of judicature, for the more speedy and effectual trial of persons accused of offences committed in the *East Indies*; § 78. 81. and 42 Geo. III. c. 85. by which offences committed by persons employed in any public service abroad, may be prosecuted in the court of King’s Bench in *England*; § 1, and that court is authorized, on motion, to award a writ of *mandamus* to any court of judicature, or the governor, &c. of the country where the

offence was committed, to obtain proof of the matters charged; § 2. and may order an examination on interrogatories *de bene esse*, where *viva voce* evidence cannot conveniently be had; § 3. and see *Rex v. Jones*, 8 East, 31.

^b *Mullick v. Lushington*, M. 26 Geo. III. *East India Company v. Ld. Malden*, E. 32 Geo. III. *Taylor v. East India Company*, M. 33 Geo. III. K. B. ^c *Spalding v. Mure*, T. 35 Geo. III. K. B.

^d *Grillard v. Hogue*, 1 Brod. & B. 519. 4 Moore, 313. S. C.

^e *Davidson v. Nicol*, 5 Moore & P. 185. 1 Dowl. Rep. 220. *Davis v. Nicholson*, 7 Bing. 356. S. C.

^f *Whytt v. Macintosh*, 2 Man. & R. 133. 8 Barn. & C. 317. S. C.

CH. XXXV. the court held, that they were not entitled to the costs attending the writ, or of the office copies of the depositions ^a.

Powers and provisions of the above statute extended by 1 W. IV. c. 22. to the colonies, &c. and to all actions in the courts at Westminster.

The powers and provisions of the above statute, which confined the power of the courts in granting writs of *mandamus* for the examination of witnesses in *India*, to causes of action arising in that country, were extended by the statute 1 W. IV. c. 22 ^b; by which it is enacted, "that all and every the powers, authorities, provisions, and matters, contained in the therein recited act ^c, relating to the examination of witnesses in *India*, shall be, and the same are thereby extended to all colonies, islands, plantations, and places, under the dominion of his majesty, in foreign parts, and to the judges of the several courts therein, and to all actions depending in any of his majesty's courts of law at Westminster, in what place or country soever the cause of action may have arisen, and whether the same may have arisen within the jurisdiction of the court to the judges whereof the writ or commission may be directed, or elsewhere, when it shall appear that the examination of witnesses, under a writ or commission issued in pursuance of the authority thereby given, will be necessary or conducive to the due administration of justice, in the matter wherein such writ shall be applied for."

Judges, to whom writ or commission is directed, empowered to enforce the attendance and examination of witnesses.

And it is thereby further enacted, that "when any writ or commission shall issue, under the authority of the said recited act, or of the power hereinbefore given by this act, the judge or judges to whom the same shall be directed, shall have the like power to compel and enforce the attendance and examination of witnesses, as the court whereof they are judges does or may possess for that purpose, in suits or causes depending in such court." ^d And "that the costs of every writ or commission to be issued under the authority of the said recited act, or of the power hereinbefore given by this act, in any action at law depending in either of the said courts at Westminster, and of the proceedings thereon, shall be in the discretion of the court issuing the same." ^e

Costs of writ or commission, and proceedings thereon, to be in discretion of the court.

Application for *mandamus*, and proceedings thereon.

The application for the writ of *mandamus* may be made by either party; and must be to the court in which the action is pending, supported by an *affidavit* of the facts, shewing the necessity for

^a Fairlie v. Parker, 1 Moore & P. 498.

^b § 1.

^c Stat. 13 Geo. III. c. 68.

^d Stat. 1 W. IV. c. 22. § 2.

^e *Id.* § 3.

issuing such writ: The rule, if granted, is, in the first instance, only a rule *nisi*, which must be served on the opposite party, and if no sufficient cause be shewn, it will be made absolute of course^a; and should be drawn up, with the clerk of the rules in the King's Bench and Exchequer, and with the secondaries in the Common Pleas. The writ of *mandamus* is made out with the attorney; and, after being signed and sealed, should be forwarded to an agent, to be delivered to the judge or judges of the court to whom it is directed, with proper instructions for the examination of the witnesses^b.

The practice of examining witnesses on interrogatories, in other cases, is regulated by the statute 1 W. IV. c. 22.^c, by which it is enacted, that "it shall be lawful to and for each of the courts at *Westminster*, "and also the court of Common Pleas of the county palatine "of *Lancaster*, and the court of pleas of the county palatine of " *Durham*, and the several judges thereof, in every action depend- "ing in such court, upon the application of any of the parties to "such suit, to order the examination on oath, upon *interro-* " *gatories* or otherwise, before the master or prothonotary of the "said court, or other person or persons to be named in such order, "of any witnesses within the jurisdiction of the court where the "action shall be depending; or to order a *commission* to issue, for "the examination of witnesses on oath, at any place or places out "of such jurisdiction, by *interrogatories* or otherwise; and by the "same, or any subsequent order or orders, to give all such di- "rections, touching the time, place, and manner of such examina- "tion, as well within the jurisdiction of the court wherein the "action shall be depending as without, and all other matters and "circumstances connected with such examinations, as may appear "reasonable and just." This clause of the statute, it will be seen, extends to the courts of the counties palatine of *Lancaster* and *Durham*; but there is a *proviso* therein^d, that "no order shall be "made, in pursuance of that act, by a single judge of the court of "pleas of the county palatine of *Durham*, who shall not also be a "judge of one of the said courts at *Westminster*."

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Courts at *Westminster*, *Lancaster*, and *Durham*, may order the examination of witnesses within their jurisdiction, by an officer of the court, &c.; or may order a commission for that purpose, out of their jurisdiction.

Proviso as to judges of Durham.

^a For the form of a rule for a *mandamus*, on stat. 1 W. IV. c. 22. founded on a judge's order, to examine witnesses in *New South Wales*, see Append. to Chap. XXXV. § 1; and for a *manda-*

mus to examine witnesses in *India*, or the colonies, &c., see *id.* § 2.

^b Chapm. *Prac.* K. B. 2 Ed. 225.

^c § 4, &c.

^d § 11.

Proceedings under the above act.

Rule or order for examining witnesses, within the jurisdiction of the court, how, and in what cases obtained.

Compelling attendance of witnesses, and production of documents.

Under the above act, a rule of court^a, or order of a judge^b, may be obtained, on a proper *affidavit*^c, for the examination of witnesses on oath, upon *interrogatories*^d, or *viva voce*^e, within the jurisdiction of the court where the action is depending; or for a *commission*^f to issue, for their examination on oath, at any place or places out of such jurisdiction, by *interrogatories*, or otherwise. In order to obtain a rule or order for the examination of witnesses, within the jurisdiction of the court, the name of the person before whom the examination is to take place must be mentioned^g. And where it was suggested, that the plaintiff had deferred his application for the examination of witnesses about to sail for *India*, until the last moment, in order to elude a cross examination, the examination was ordered to be taken provisionally; the plaintiffs satisfying the court by *affidavit*, that the application had not been delayed with any sinister intention^h. It has been doubted, whether an advanced state of pregnancy be a cause for the examination of a female witness by the prothonotary, under the above statuteⁱ: If it be, it must be shewn, by *affidavits* of competent persons, that the delivery will probably happen about the time fixed for the trial of the cause^j. But the court permitted the examination of a witness before the prothonotary, under the above statute, on payment of costs, upon the *affidavit* of his medical attendant, who swore that he was in a precarious state, and could not attend at the trial without great danger^k.

“ When any rule or order shall be made for the examination of witnesses, within the jurisdiction of the court wherein the action

^a For the form of a rule of court for the examination of witnesses on interrogatories, in K. B., before stat. 1 W. IV. c. 22, see Append. to Tidd *Prac.* 9 Ed. Chap. XXXV. § 12.; and see *id.* § 13. *Pirie v. Iron*, 1 Moore & S. 223. 1 Dowl. Rep. 252, S. C.

^b Append. to Chap. XXXV. § 4.; and for a judge's order to examine witnesses on interrogatories in vacation, before stat. 1 W. IV. c. 22, see Append. to Tidd *Prac.* 9 Ed. Chap. XXXV. § 14.

^c Append. to Chap. XXXV. § 3. and see Append. to Tidd *Prac.* 9 Ed. Chap. XXXV. § 11.

^d Append. to Tidd *Prac.* 9 Ed. Chap. XXXV. § 21, 2.

^e Append. to Chap. XXXV. § 5.

^f *Id.* § 12.; and see Append. to Tidd *Prac.* 9 Ed. Chap. XXXV. § 15 to 20.

^g *Doe d. Thorn v. Phillips*, 1 Dowl. Rep. 56. 2 Leg. Obs. 76. S. C. per Taunton, J.

^h *Pirie v. Iron*, 8 Bing. 143. 1 Moore & S. 224. S. C.

ⁱ *Abraham v. Newton, (or Norton)* 8 Bing. 274. 1 Moore & S. 384. 1 Dowl. Rep. 266. S. C.

^j *Pond v. Dimes*, 3 Moore & S. 161.

“shall be depending, by authority of that act, it shall be law- CH. XXXV.
 “ful for the court, or any judge thereof, in and by the first
 “rule or order to be made in the matter, or any subsequent
 “rule or order, to command the attendance of any person
 “to be named in such rule or order, for the purpose of being
 “examined, or the production of any writings or other documents
 “to be mentioned in such rule or order; and to direct the attend-
 “ance of any such person to be at his own place of abode, or
 “elsewhere, if necessary or convenient so to do : And the wilful Disobedience to
 “disobedience of any such rule or order shall be deemed a con- be deemed a
 “tempt of court, and proceedings may be thereupon had, by at- contempt of
 “tachment”, (the judge’s order being made a rule of court, before court.
 “or at the time of the application for an attachment,) if, in addition
 “to the service of the rule or order, an appointment of the time
 “and place of attendance in obedience thereto, signed by the
 “person or persons appointed to take the examination, or by one
 “or more of such persons, shall be also served, together with, or
 “after the service of such rule or order : Provided always, that Conduct money,
 “every person whose attendance shall be so required, shall be and payment of
 “entitled to the like conduct money, and payment for expences expences of wit-
 “and loss of time, as upon attendance at a trial : Provided also, Proviso as to
 “that no person shall be compelled to produce, under any such production of
 “rule or order, any writing or other document, that he would not documents.
 “be compellable to produce at a trial of the cause.”^b

And it is thereby further enacted, that “it shall be lawful for Prisoner may be
 “any sheriff, gaoler, or other officer, having the custody of any removed by
 “prisoner, to take such prisoner for examination, under the au- *habeas corpus*,
 “thority of that act, by virtue of a writ of *habeas corpus*, to be for examination.
 “issued for that purpose ; which writ shall and may be issued by
 “any court or judge, under such circumstances, and in such man-
 “ner, as such court or judge may now by law issue the writ, com-
 “monly called a writ of *habeas corpus ad testificandum*.”^c

If the examination is directed to be taken on *interrogatories*, the Examination on
 party prepares his *interrogatories* ^d, which must be engrossed on *interrogatories*.

^a For the proceedings against a wit-
 ness for non-attendance, see Chapm.
Prac. K. B. 2 Ed. 251.

Stat. 1 W. IV. c. 22. § 5.

Id. § 6. Append. to Chap. XXXV.
 8.; and for the *process* for this writ, *id.*

§ 7; and for the *affidavit* on which it was
 founded, see Chapm. *Prac. K. B.* 2 Ed.
 249.

^d For the form of interrogatories for
 the plaintiff, see Append. to Tidd *Prac.*
 9 Ed. Chap. XXXV. § 21; for de-

CH. XXXV. parchment, and signed by counsel, and a copy given to the opposite party, in order that he may prepare cross interrogatories, if he think proper. Notice of the time and place of examination of the witness ^a, must also be given to the adverse attorney; and the examination must be on oath, or affirmation of the witness, the oath to be administered by the person taking the examination, or by a judge of the court in which the action is pending ^b.

Vivâ voce.

If the examination be ordered to be taken *vivâ voce*, an appointment must be obtained from the person directed by the rule or order to take the examination: this appointment must specify the time and place of taking the examination, and a copy of the rule or order, with the appointment, must be served on the opposite party; and the witness will then be examined on oath or affirmation, to be administered by the person appointed by the rule for that purpose, in the presence of all parties, or such of them as think proper to attend ^c.

Commission for
examining wit-
nesses abroad.

The power of the courts at *Westminster* to grant commissions for the examination of witnesses *abroad*, on the statute 1 W. IV. c. 22. is not confined to cases where the witnesses reside within the king's dominions ^d; but a commission may issue to examine them, in any place out of the jurisdiction of the courts, on motion in that court in which the action shall be depending ^d. This statute, however, does not seem to apply to indictments ^e. In an action on a policy of insurance, a rule having been obtained for a commission to examine witnesses abroad on interrogatories, *three weeks'* time was limited for taking the examinations; which proving insufficient, the time was afterwards enlarged ^f. In a subsequent case, where the defendant had obtained a rule for issuing a commission to take interrogatories in *France*, Lord *Tenterden* said, that it would be limiting the commission too much, to make it part of the order, that it should be returned in *three weeks*; and observed,

defendant, *id.* § 22; and for the proceedings on the rule or order to examine witnesses on interrogatories, before stat. 1 W. IV. c. 22, see Tidd *Prac.* 9 Ed. 811.

^a Append. to Chap. XXXV. § 6.

^b *Chapm. Prac.* K. B. 2 Ed. 241.

^c *Id.* 241, 2.

^d *Duckett v. Williams*, 1 *Crompt. &*

J. 510. 1 *Tyr. Rep.* 502. 1 *Price, N. R.* 40, 1 *Dowl. Rep.* 291. S. C. *Reynard v. Cope*, 1 *Tyr. Rep.* 505. (a.)

^e *Rex v. Lady Briscoe*, 1 *Dowl. Rep.* 520. 5 *Leg. Obs.* 384. S. C. *per Parke, J.*

^f *Shovey v. Shebelli*, 1 *Tyr. Rep.* 505. (a.)

that if it were not returned in proper time, the plaintiff might apply CH. XXXV. that the cause should proceed^a. The witnesses intended to be examined in this case, and the time, place, and manner of examining them, were mentioned in the order^a.

The commission for the examination of witnesses, out of the jurisdiction of the court, must be made out by the party obtaining the rule: and the interrogatories being prepared, engrossed on parchment, and signed by counsel, should be annexed to the commission, with the cross interrogatories, if any; after which the same should be forwarded, with full instructions, to an agent, to be delivered to the commissioners, the time and place for examination being appointed, and notices thereof given, as directed by the commission; and the examinations having been taken in pursuance thereof, the commission and interrogatories, with the depositions annexed, are returned to the court in which the action is pending, certified under the seals of the commissioners; and either party will be entitled to a copy thereof^b.

By whom made out, and proceedings thereon.

As to the mode of examining witnesses on interrogatories, it is declared by the act^c to be "lawful for all and every person authorized to take the examination of witnesses by any rule, order, writ, or commission, made or issued in pursuance of that act, and he and they are thereby authorized and required, to take all such examinations upon the oath of the witnesses, or affirmation, in cases where affirmation is allowed by law instead of oath, to be administered by the person so authorized, or by any judge of the court wherein the action shall be depending: And if, upon such oath or affirmation, any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall and may be indicted and prosecuted for such offence, in the county wherein such evidence shall be given, or in the county of *Middlesex*, if the evidence be given out of *England*: And that it shall and may be lawful for the master, prothonotary, or any other person to be named in any such rule or order as aforesaid, for taking any examination in pursuance thereof, and

Examination of witnesses to be taken upon oath, or affirmation.

Persons giving false evidence, to be deemed guilty of perjury.

Persons appointed for taking examinations, to report

^a *Reynard v. Cope*, 1 Tyr. Rep. 505. 246.

(a)

^c Stat. 1 W. IV. c. 22, § 7.

^b *Chapm. Prac. K. B.* 2 Ed. 242.

to the court,
upon the con-
duct or absence
of witnesses, if
necessary.
Proceedings
thereon.

Costs of examin-
ing witnesses
on interroga-
tories.

By stat. 1 W.
IV. c. 22.

" he and they are thereby required, to make, if need be, a special
" report to the court, touching such examination, and the conduct
" or absence of any witness, or other person thereon, or relating
" thereto; and the court is thereby authorized to institute such
" proceedings, and make such order and orders, upon such
" report, as justice may require, and as may be instituted and
" made in any case of contempt of the court."^a

The party succeeding in the action, was not formerly entitled to the costs of examining his witnesses on interrogatories, or taking office copies of depositions; but the party whose witnesses were examined, paid his own expence, unless it were otherwise expressed in the rule^b: and this held, as well with regard to witnesses examined abroad, as in this country^c: The reason was, that by the practice of the court of Chancery, a party applying for a commission to examine witnesses on his behalf, must pay the expences; and unless the courts of law had adopted the same rule, with respect to the party applying for leave to examine witnesses abroad on depositions, which could not be done without the other party's consent, such consent would never have been given, but the applicant would have been driven to the expence of applying for a commission^d. But, in the Common Pleas, where the rule of court for examining witnesses by commission, expressed that the depositions of witnesses at *Hamburgh* and *Lubeck* were to be taken, and the commission was directed to persons at *Hamburgh*, and the costs were ordered to abide the event of the trial, the expences of bringing witnesses from *Lubeck* to *Hamburgh* were allowed on taxation^e. And now, by the statute 1 W. IV. c. 22^f, " the costs of every rule or order to be made for the examination
" of witnesses, under any commission or otherwise, by virtue of
" that act, and of the proceedings thereupon, shall, except in the case
" thereinbefore provided for^g, be costs in the cause, unless other-
" wise directed, either by the judge making such rule or order, or
" by the judge before whom the cause may be tried, or by the
" court."

^a Stat. 1 W. IV. c. 22, § 8.

^d Same v. Same, *id.* 393, 4.

^b Stephens v. Crichton, 2 East, 259.

^c Muller v. Hartshorne, 3 Bos. & P.

and see Hul. Costs, 2 Ed. 439.

556. and see Tidd Prac. 9 Ed. 813.

^e Taylor v. Royal Exchange As-

^f § 9.

surance Company, 8 East, 393.

^g *Ante*, 160.

As the depositions on interrogatories, however, are only taken *de bene esse*, it is enacted by the above statute^a, that “no examination or deposition, to be taken by virtue of that act, shall be read in evidence at any trial, without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the judge, that the examinant, or deponent, is beyond the jurisdiction of the court, or dead, or unable, from permanent sickness, or other permanent infirmity, to attend the trial; in all or any of which cases, the examinations and depositions, certified under the hand of the commissioners, master, prothonotary, or other person taking the same, shall and may, without proof of the signature to such certificate, be received and read in evidence, saving all just exceptions.”

Restriction, as to the reading of examinations or depositions, without consent of the party.

By the late act for the further amendment of the law^b, &c. reciting that it is expedient to lessen the expence of the proof of written or printed documents, or copies thereof, on the trial of causes; it is enacted, that “it shall and may be lawful for the judges of the superior courts of common law at *Westminster*, or any *eight* or more of them, of whom the chief of each of the said courts shall be *three*, at any time within *five* years after that act shall take effect, to make regulations, by general rules or orders, from time to time, in term or in vacation, touching the voluntary admission, upon an application for that purpose, at a reasonable time before the trial, of one party to the other, of all such written or printed documents, or copies of documents, as are intended to be offered in evidence on the said trial, by the party requiring such admission, and touching the inspection thereof before such admission is made, and touching the costs which may be incurred by the proof of such documents or copies on the trial of the cause, in case of the omitting to apply for such admission, or the not producing of such document or copies, for the purpose of obtaining admission thereof, or of the refusal to make such ad-

Power of judges to make regulations, as to the admission of written or printed documents, &c.

^a Stat. 1 W. IV. c. 22. § 10.; and as to giving depositions in evidence, see *Tidd Prac.* 9 Ed. 811, &c.

^b 3 & 4 W. IV. c. 42. § 15. and see 2 Rep. C. L. Com. 17. 67. And as to

written evidence, of a public or private nature, see *Tidd Prac.* 9 Ed. 800, &c. and the several cases and authorities there referred to.

CH. XXXV. "mission, as the case may be, and as to the said judges shall seem meet; and all such rules and orders shall be binding and obligatory, in all courts of common law, and of the like force, as if the provisions therein contained, had been expressly enacted by parliament."

Witnesses interested solely on account of verdict, to be admissible.

In order to render the rejection of witnesses, on the ground of interest, less frequent, it is further enacted by the 3 & 4 W. IV. c. 42^a, that "if any witness shall be objected to as incompetent, on the ground that the verdict or judgment, in the action in which it shall be proposed to examine him, would be admissible in evidence for or against him, such witness shall nevertheless be examined; but, in that case, a verdict or judgment in that action, in favour of the party on whose behalf he shall have been examined, shall not be admissible in evidence for him, or any one claiming under him; nor shall a verdict or judgment, against the party on whose behalf he shall have been examined, be admissible in evidence against him, or any one claiming under him."

Direction to indorse name of witness on the record.

And that "the name of every witness objected to as incompetent, on the ground that such verdict or judgment would be admissible in evidence for or against him, shall, at the trial, be indorsed on the record or document on which the trial shall be had, together with the name of the party on whose behalf he was examined, by some officer of the court, at the request of either party; and shall be afterwards entered on the record of the judgment: And such indorsement or entry shall be sufficient evidence that such witness was examined, in any subsequent proceeding in which the verdict or judgment shall be offered in evidence."^b

^a § 26. And as to the incompetency of witnesses, on the ground of their being interested in the event of the suit, see the cases of *Rex v. Bray*, Cas. temp. Hardw. 358. *Abraham v. Bunn*, 4 Bur. 2251. *Bent v. Baker*, 3 Durnf. & E.

27. *Smith v. Prager*, 7 Durnf. & E. 60. *Doddington v. Hudson*, 1 Bing. 257. and *Radburn v. Morris*, 4 Bing. 649.

^b Stat. 3 & 4 W. IV. c. 42. § 27.

CHAP. XXXVI.

Of ARBITRATION.

IT was formerly holden, that the power of arbitrators might be determined by the *revocation* of the parties; respecting which it was laid down, that although a man were bound in a bond to stand to the arbitrament of another, yet he might countermand or revoke the power of the arbitrator; for a man could not, by his own act, make an authority, power, or warrant, not countermandable, which by the law, and of its own nature, might be countermanded^a. But now, by the late act for the further amendment of the law^b, &c. reciting that it is expedient to render references to arbitration more effectual; it is enacted, that "the power and authority of any arbitrator or umpire, appointed by or in pursuance of any rule of court, or judge's order, or order of *nisi prius*, in any action now brought, or which shall be hereafter brought, or by or in pursuance of any submission to reference, containing an agreement that such submission shall be made a rule of any of his majesty's courts of record, shall not be *revocable* by any party to such reference, without the leave of the court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a judge; and the arbitrator or umpire shall and may, and is thereby required to proceed with the reference, notwithstanding any such revocation, and to make such award, although the person making such revocation, shall not afterwards attend the reference; and that the court, or any

Power of arbitrators formerly revocable by the parties.

Cannot now be revoked, without leave of court.

^a Vynior's case, 8 Co. 82. and see Milne v. Gratrix, 7 East, 608. Oliver v. Collings, 11 East, 367. Curtis v. Potts, 3 Maule & S. 145. King v. Joseph, 5 Taunt. 452. Marsh v. Bulteel, 5 Barn. & Ald. 507. 2 Chit. Rep. 316. 1 Dowl. & R. 106. S. C. Green v. Pole, 4 Moore & P. 198. 6 Bing. 443. S. C. Skee v. Coxon, 10 Barn. & C. 483. Tidd *Prac.* 9 Ed. 823.

^b Stat. 3 & 4 W. IV. c. 42. § 39. and see 2 Rep. C. L. Com. 27. 79. As to submissions to arbitration in general, see Tidd *Prac.* 9 Ed. 819, &c.; and in what cases, and by what means, they might have been determined or revoked, with the consequences of revocation, previously to the above enactment, see *id.* 822, 3, 4. and 1st Supplement thereto, 142, 3.

Power to compel attendance of witnesses.

“ judge thereof, may from time to time enlarge the term for any such arbitrator making his award.”

And it is thereby further enacted, that “ when any reference shall have been made by any such rule or order as aforesaid, or by any submission containing such agreement as aforesaid, it shall be lawful for the court by which such rule or order shall be made, or which shall be mentioned in such agreement, or for any judge, by rule or order to be made for that purpose, to command the attendance and examination of any person to be named, or the production of any documents to be mentioned in such rule or order; and the disobedience to any such rule or order shall be deemed a contempt of court, if, in addition to the service of such rule or order, an appointment of the time and place of attendance in obedience thereto, signed by one at least of the arbitrators, or by the umpire, before whom the attendance is required, shall also be served, either together with, or after the service of such rule or order: Provided always, that every person whose attendance shall be so required, shall be entitled to the like conduct money, and payment of expences, and for loss of time, as for and upon attendance at any trial: Provided also, that the application made to such court or judge, for such rule or order, shall set forth the county where such witness is residing at the time, or satisfy such court or judge, that such person cannot be found: Provided also, that no person shall be compelled to produce, under any such rule or order, any writing or other document, that he would not be compelled to produce at a trial, or to attend at more than two consecutive days, to be named in such order.”^a

Power of arbitrators, under rule of court, &c. to administer oath.

And that “ when, in any rule or order of reference, or in any submission to arbitration, containing an agreement that the submission shall be made a rule of court, it shall be ordered or agreed that the witnesses upon such reference shall be examined upon oath, it shall be lawful for the arbitrator or umpire, or any one arbitrator, and he or they are thereby authorized and required, to administer an oath to such witnesses, or to take their affirmation, in cases where affirmation is allowed by law instead of oath; and if, upon such oath or affirmation, any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall be prosecuted and punished accordingly.”^b

^a Stat. 3 & 4 W. IV. c. 42. § 40.

^b § 41.

CHAP. XXXVII.

Of INTEREST on DEBTS, &c.

IT was formerly holden, that interest was payable on all liquidated sums, from the instant the principal became due^a: and accordingly, interest was allowed for money lent to^b, or paid for the defendant^c; or on an account stated^d. But it was not recoverable in an action for goods sold and delivered^e; or for work and labour^f: and it was afterwards settled, that interest was recoverable in *four* cases only: 1st, where there was a contract in writing, for the payment of money on a certain day, as on bills of exchange, or promissory notes, &c.; 2dly, where there had been an express promise to pay interest; thirdly, where, from the course of dealing between the parties, such a promise might have been inferred; or fourthly, where it could be proved that the money had been used, and interest actually made of it^g: and therefore it was holden, that interest was not recoverable for money lent generally, without a contract for it, expressed, or to be implied from the usage of trade, or from special circumstances, or from written securities for payment of the principal money at a given time^h. So, interest

In what cases interest was formerly recoverable, and in what not.

- ^a *Blaney v. Hendricks*, 2 Blac. Rep. 184.
- ^b *Blaney v. Hendricks*, 2 Blac. Rep. 184. 3 Wils. 205. S. C.
- ^c *Vernon v. Cholmondeley*, Bunb. 119. *Blaney v. Hendricks*, 2 Blac. Rep. 184. 3 Wils. 205. S. C. and see *Calton v. Bragg*, 15 East, 224, 5.
- ^d *Trelawney v. Thomas*, 1 H. Blac. 303.
- ^e *Blaney v. Hendricks*, 2 Blac. Rep. 184. 3 Wils. 205. S. C.
- ^f *Pinock v. Willett*, Barnes, 228. and see *Blaney v. Hendricks*, 2 Blac. Rep. 184. 3 Wils. 205. S. C.
- ^g *Trelawney v. Thomas*, 1 H. Blac. 303. and see *Milcom v. Hayward*, 9 Price, 134.
- ^h *De Havilland v. Bowerbank*, 1 Campb. 50.; and see *Nichol v. Thompson*, *id.* 52. *n.* *Rogers v. Boehm*, 2 Esp. Rep. 702. 704. *Willis v. Commissioners of Appeal in Prize causes*, 5 East, 22. 1 Smith R. 399. S. C. *Hammel v. Abel*, 4 Taunt. 298. *Bruce v. Hunter*, 3 Campb. 467. *Goodchild v. Fenton*, 3 Younge & J. 481. *Foster v. Weston*, 4 Moore & P. 589. 6 Bing. 709. S. C.
- ⁱ *Calton v. Bragg*, 15 East, 223. *Page v. Newman*, 9 Barn. & C. 378. 4 Man. & R. 305. S. C.

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Jury empowered
to allow interest
upon debts.

Interest not
formerly re-
coverable in
trover, or tres-
pass *de bonis
asportatis*, be-
yond value of
goods.

Nor in actions
on policies of
insurance.

was not recoverable on an account stated^a, unless it had been paid on former balances^b; or, on money had and received, unless there was some express promise to pay interest^c, or something from which such a promise might have been inferred; or it was proved that the money had been used by the defendant, and interest made of it^d. But now, by the late act for the further amendment of the law^e, &c. it is enacted, that "upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or, if payable otherwise, then from the time when demand of payment shall have been made in writing; so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand, until the term of payment: provided, that interest shall be payable in all cases, in which it is now payable by law."

In actions of *trover*, or trespass *de bonis asportatis*, interest was not formerly recoverable, as such, beyond the amount of the value of the goods, at the time of the conversion or seizure; though, in *trover* for a bill of exchange, it was holden, that damages were to be calculated according to the amount of the principal and interest due upon the bill, at the time of the demand and refusal to deliver it up^f. In actions on *policies* of insurance, it was formerly usual to allow interest^g; but this practice having been disapproved of^h, it was afterwards settled, that in an action on a policy, the plaintiff

^a *Chalie v. Duke of York*, 6 Esp. Rep. 45. *Nichol v. Thompson*, 1 Campb. 52. n.

^b *Nichol v. Thompson*, 1 Campb. 52. n. and see *Hammel v. Abel*, 4 Taunt. 298.

^c *Hicks v. Mareco* 5 Car. & P. 498. *per* Ld. *Lyndhurst*, Ch. B.

^d *De Havilland v. Bowerbank*, 1 Campb. 50. and see *Crockford v. Winter*, *id.* 124. 129. *Walker v. Constable*, 1 Bos. & P. 306. *Tuppenen v. Randall*, 2 Bos. & P. 467. 472. *Depcke v. Munn*,

3 Car. & P. 112. *Goodchild v. Fenton*, 3 Younge & J. 481. and see *Tidd Prac.* 9 Ed. 871, 2. and 1st Supplement thereto, 153, 4.

^e 3 & 4 W. IV. c. 42. § 28.

^f *Mercer v. Jones*, 3 Campb. 477. and see *Paine v. Pritchard*, 2 Car. & P. 558.

^g *Kingston v. M'Intosh*, 1 Campb. 518.

^h *De Bernales v. Fuller*, 2 Campb. 427.

could not recover interest upon the sum insured ^a; unless evidence were given that he had applied to the underwriter to settle the loss, soon after it happened, and notified to him the ground of such application ^b. But now, by the late act for the further amendment of the law ^c, &c. "the jury, on the trial of any issue, or on any "inquisition of damages, may, if they shall think fit, give damages "in the nature of interest, over and above the value of the goods "at the time of the conversion or seizure, in all actions of *trover*, "or *trespass de bonis asportatis*; and over and above the money "recoverable in all actions on policies of assurance, made after the "passing of that act."

On a writ of error returnable in the King's Bench, it was formerly the practice for that court, on motion, after affirmance, or *non pros* for not assigning errors, to order the master to compute *interest* on the sum recovered, by way of damages, from the day of signing final judgment below, down to the time of affirmance or *non pros*, and that the same should be added to the costs taxed for the plaintiff in the original action ^d. In the Exchequer chamber, though the court, it seems, were bound to allow double *costs* to the defendant in error, on the affirmance of a judgment after verdict in the King's Bench, yet it was entirely a matter in their discretion, whether or not *interest* should be allowed on such affirmance ^e: And the course was said to be, for the officer to settle the costs, unless any particular direction were given by the court; and, in taxing them, he allowed double the money out of pocket, or thereabouts, but added no interest as a matter of course ^f. In the latter court, there was a great variety of decisions, as to the cases in which *interest* was or was not recoverable, on the affirmance of a judgment ^g; but it seemed at length to be the practice, to give interest only

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In actions of trover, or trespass for carrying away goods, and on policies of insurance, the jury may give damages in nature of interest.

Interest formerly allowed as damages, on writ of error, after affirmance or *non pros*, in K. B.

Practice in Exchequer Chamber.

Interest only given in cases

^a Kingston v. M'Intosh, 1 Campb. 518.

^b Bain v. Case, 3 Car. & P. 496. 1 Moody & M. 262. S. C. and see Tidd Prac. 9 Ed. 873.

^c Stat. 3 & 4 W. IV. c. 42. § 29.

^d Zinck v. Langton, Doug. 752. n. 3. and see Bishop of London v. Mercers' Company, 2 Str. 931. Bodily v. Bellamy, 2 Bur. 1096, 7. 1 Blac. Rep.

267, 8. S. C. Entwistle v. Shepherd, 2 Durnf. & E. 79. Hilhouse v. Davis, 1 Maule & S. 171. 173.

^e Shepherd v. Mackreth, 2 H. Blac. 234.

^f Bodily v. Bellamy, 2 Bur. 1096, and see Shepherd v. Mackreth, 2 H. Blac. 234.

^g For these decisions, see Tidd Prac. 9 Ed. 1182, 3.

where it was recoverable below, unless writ of error was brought for delay.

Interest to be allowed on all writs of error, for the time execution has been delayed.

in cases where it was recoverable below^a; unless it were distinctly proved or admitted, that the writ of error was brought for delay^b; and therefore, though they once allowed interest in an action of *tort*^c, and on an attorney's bill^d, yet these decisions were afterwards disapproved of; and interest was refused in the latter action^e; and it was said to be contrary to the practice of the court, to give interest in an action for mere unliquidated damages^f. But now, by the late act for the further amendment of the law^g, &c. "if any person shall sue out any writ of error, upon any judgment whatsoever, given in any court, in any action personal, and the court of error shall give judgment for the defendant thereon, then interest shall be allowed by the court of error, for such time as execution has been delayed by such writ of error, for the delay-
"ing thereof."

^a *Becher v. Jones*, 2 Campb. 428. n. and see *Porter v. Palsgrave*, *id.* 472. *Boyce v. Warburton*, *id.* 480. *Marshall v. Poole*, 13 East, 98. *Slack v. Lowell*, 3 Taunt. 157. *Hammel v. Abel*, and *Middleton v. Gill*, 4 Taunt. 298. *De Tastet v. Rucker*, 9 Price, 440, 41. *Gurney v. Gordon*, 2 Tyr. Rep. 616. 619.

^b *Saxelby v. Moor*, 3 Taunt. 51.

^c *Earl of Lonsdale v. Little Dale*, 2 H. Blac. 267. 287.

^d *Shepherd v. Mackreth*, *id.* 284. 287.

^e *Walker v. Bayley*, 2 Bos. & P. 219.

^f *Bristow v. Waddington*, 2 New Rep. C. P. 360. and see *Kington v. M'Intosh*, 1 Campb. 518. *Becher v. Jones*, 2 Campb. 428. n.

^g 3 & 4 W. IV. c. 42. § 30. and see 3 Rep. C. L. Com. 36. 80.

CHAP. XXXIX.

Of IMMEDIATE JUDGMENT *and* EXECUTION, *after* VERDICT *or* NONSUIT, *in* VACATION.

THE writ of *distringas*, or *habeas corpora juratorum*, upon which the cause is tried at the *assizes*, or sittings at *nisi prius* after term in *London* or *Middlesex*, being returnable only in *term* time, it consequently happened, before the statute 1 W. IV. c. 7. that when a cause was tried in *vacation*, the plaintiff must have waited until the next *term*, before he could have obtained final judgment, or taken out execution. This practice was attended with great inconvenience; as it often happened that, by the intervening insolvency of the adverse party, the whole proceedings were rendered unavailing; and the plaintiff not only lost his debt, but was put to great additional expence, by the costs of the suit^a: To remedy this inconvenience, it was enacted by the statute 1 W. IV. c. 7.^b, that "in all actions brought in either of the superior courts of law at *Westminster*, by whatever form of process the same may be commenced, it shall be lawful for the judge before whom any issue "joined in such action shall be to be tried, in case the plaintiff or "demandant therein shall become nonsuit, or a verdict shall be "given for the plaintiff or demandant, defendant or tenant, to "certify^c, under his hand, on the back of the record, at any time "before the end of the sittings or assizes, that in his opinion execution ought to issue in such action forthwith, or at some day to be "named in such certificate, and subject or not, to any condition or "qualification; and in case of a verdict for the plaintiff, then either "for the whole or for any part of the sum found by such verdict; "in all which cases, a rule for judgment may be given^d, costs

Jury process,
how returnable,
before stat. 1
W. IV. c. 7.

Inconvenience
of this practice.

The judge, before whom any action shall be tried, may certify, before the end of the sittings or assizes, that execution ought to issue forthwith.

In which case judgment may

^a See 2 Rep. C. L. Com. 27. 81.

^b § 2.

^c Append. to Chap. XXXIX. § 1.

^d As to the rule for judgment, see Tidd Prac. 9 Ed. 903. It should be remembered however, that, by a late rule

of all the courts, (R. H. 2 W. IV. reg. 1. § 67. 8 Bing. 297, 8.) "after a verdict or nonsuit, judgment may be signed on the day after the appearance day of the return of the *distringas*, or *habeas corpora*, without any rule for judgment."

be signed, and execution issued, according to terms of certificate.

"taxed", and judgment signed^a forthwith, and execution^b may be "issued forthwith or afterwards, according to the terms of such certificate, on any day in vacation or term: and the *postea*, with such certificate as a part thereof, shall and may be entered of record^c, as of the day on which the judgment shall be signed, although the writ of *distringas juratores*, or *habeas corpora juratorum*, may not be returnable until after such day: Provided always, that it shall be lawful for the party entitled to such judgment, to postpone the signing thereof."

Decisions on the above statute.

On this statute certificates have been granted, to entitle the plaintiff to immediate execution, in actions of *assumpsit* on promissory notes^d, &c. or in other actions, where there was no reasonable ground of defence, and the judge has been of opinion, upon the facts proved at the trial, that execution ought to be issued forthwith, or at a future day, before the return of the jury process: and the judge will certify for immediate execution, in an action of *assumpsit*, though the verdict be taken by consent, and the consent does not contain any such terms^e. It was not formerly usual for the judge to certify, in an action of *debt* on simple contract, where the defendant was obliged to plead and go to trial, or the plaintiff might have signed final judgment, without any writ of inquiry, on proof of the amount of his debt^f: and there has been some doubt amongst the judges, whether the statute was not intended to be confined to cases of *contract*^g: But it seems to be now settled, that the plaintiff is entitled to early execution, under the above statute, in actions of *debt*, as well as in other forms of action^h; and that it is not limited to cases of *contract*, but applies to all actions, where the judge thinks there ought to be such executionⁱ: And accordingly, a certificate has been granted in an action for *mesne profits* and costs in *ejectment*:^j and, in an action for criminal conversation,

^a As to taxing costs, and signing final judgment, see Tidd *Prac.* 9 Ed. 930.

^b As to the time of suing out execution in general, see Tidd *Prac.* 9 Ed. 994.

^c Append. to Chap. XXXIX. § 2.

^d Bell v. Smith, 5 Car. & P. 10. *per* Paterson, J.

^e Anon. 1 Moody & R. 167. *per* Parke, J.

^f Fisher v. Davies, 1 Moody & R. 98. *per* Ld. Tenterden, Ch. J. Ward v. Crocket, 5 Car. & P. 10. *per* Parke, J. Percival v. Alcock, 1 Moody & R. 167. *per* Parke, J.

^g Barden v. Cox, 1 Moody & R. 203. *per* Paterson, J.

^h Younge v. Crooks, *id.* 220. *per* Parke, J.

where the plaintiff, to prevent a verdict passing against him, in consequence of the prevarication of one of his witnesses, consented to be nonsuited; the judge who tried the cause directed execution to issue at the expiration of a month^a. Certificates have been also granted, in cases where the action was commenced before the passing of the act^b; but they are of course not grantable, where there was a reasonable ground of defence^c. And, in an action against an executor, on the bond of his testator, where a verdict is given for the plaintiff, on the plea of *non est factum*, if the judge make an order for immediate execution, it will not entitle the plaintiff to issue execution in the first instance, against the goods of the defendant^d. *Affidavits*, it seems, are not in general admissible, in support of an application for immediate execution^e; but there may be cases in which justice may require them: and, in a late case^f, a certificate was granted, on an *affidavit* of facts, after verdict for the plaintiff, in an undefended cause.

By the above statute^g, "every judgment, to be signed by virtue of that act, may be entered and recorded as the judgment of the court wherein the action shall be depending, although the court may not be sitting on the day of the signing thereof^h; and every execution issued by virtue of that act, shall and may bear *teste* on the day of issuing thereofⁱ; and such judgment and execution shall be as valid and effectual, as if the same had been signed and recorded, and issued, according to the course of the common law."

Entering and recording judgment.

Teste of execution.

Provided always, that "notwithstanding any judgment signed or recorded, or execution issued, by virtue of that act, it shall be lawful for the court in which the action shall have been brought, to order such judgment to be vacated, and execution to be stayed

Judgment may be vacated, and execution stayed, or set aside, &c., and new trial granted.

^a *Hambidge v. Crawley*, 5 Car. & P. 9. n. per *Tindal*, Ch. J.

R. 150. per *Ld. Lyndhurst*, Ch. B.

^b *Bell v. Smith*, *id.* 10. per *Patterson*, J.

^c *Ruddick v. Simmons*, 1 Moody & R. 184. per *Bayley*, B.

^e Stat. 1 W. IV. c. 7. § 3.

^d *Barford v. Nelson*, 5 Car. & P. 8. per *Patterson*, J. *Wright v. Guiver*, *id.* 9. n. per *Ld. Lyndhurst*, Ch. B. *Crookshank v. Rose*, *id. ib.* 19, 20. per *Ld. Tenterden*, Ch. J.

^h As to the entry of judgments, see *Tidd Prac.* 9 Ed. 931, 2.

^e *Ward v. Thomas*, 6 Leg. Obs. 156. Excheq.

ⁱ And see stat. 3 & 4 W. IV. c. 67. § 2, by which *all* writs of execution may be *tested* on the day on which the same are issued, and be made *returnable* immediately after execution thereof. *Post*, 183.

^f *Gervas v. Burtchley*, 1 Moody &

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XXXIX.

" or set aside, and to enter an arrest of judgment, or grant a new trial, or new writ of inquiry, as justice may appear to require; " and thereupon the party affected by such writ of execution, shall " be restored to all that he may have lost thereby, in such manner " as upon the reversal of a judgment, by writ of error or other- " wise, as the court may think fit to direct." ^a On this *proviso*, it has been decided, that when a judge at the assizes, orders that the plaintiff shall have execution within a limited time, and judgment is thereupon entered up, and execution issued, the defendant is not precluded from applying in the next term, to the court above, to enter a suggestion, to deprive the plaintiff of his costs, on a court of requests' act ^b: A judge, at the assizes, has no power to order such a suggestion to be entered ^b.

Not to affect provision in stat. 11 Geo. IV. & 1 W. IV. c. 70, relating to writs of possession.

Limitation, as to taxing costs.

Provided also, that " nothing in that act contained, shall be " deemed to frustrate or make void any provision relating to the " issuing of any writ of *habere facias possessionem*; contained in the " act passed in the first year of the reign of his present majesty, " intituled An act for the more effectual administration of justice, in " *England and Wales*." ^c And that " no officer of either of the said " courts shall, for the purpose of taxing costs on any judgment to " be signed by virtue of that act, be compelled to attend at any " time between the last day of *August*, and the *twenty-first* day of " *October* in any year." ^d

^a Stat. 1 W. IV. c. 7. § 4. And as to moving for a new trial, or in arrest of judgment, &c. see Tidd *Prac.* 9 Ed. 904.

^b *Baddeley v. Oliver*, 1 Crompt. & M. 219. 3 Tyr. Rep. 145. 1 Dowl. Rep. 598. S. C. and see Tidd *Prac.* 9 Ed.

961.

^c § 5. and see stat. 11 Geo. IV. & 1 W. IV. c. 70. § 38. 1 Sup. to Tidd *Prac.* 9 Ed. 190. *Post*, Chap. XLV.

^d Stat. 1 W. IV. c. 7. § 6.

CHAP. XL.

Of Costs.

EXECUTORS and **administrators** not being particularly excepted out of the statute 23 Hen. VIII. c. 15. it was formerly holden, that they were not liable to costs, when plaintiffs, upon a nonsuit^a or verdict^a, where they necessarily sued in their representative character, and could not bring the action in their own right; as upon a *contract* entered into with the testator or intestate^a, or for a *wrong* done in his life time^a: though, where the cause of action arose after the death of the testator or intestate, and the plaintiff might sue thereon in his own right, he was not excused from payment of costs, though he brought the action as executor or administrator; as upon a *contract*^b, express or implied, or in *trover*, for a conversion after the death of the testator or intestate^b. But now, by the late act for the further amendment of the law^c, &c., it is enacted, that “in every action brought by any executor or administrator, in “right of the testator or intestate, such executor or administrator “shall, unless the court in which such action is brought, or a “judge of any of the superior courts of law at *Westminster*, shall “otherwise order, be liable to pay costs to the defendant, in case “of being nonsuited, or a verdict passing against the plaintiff, and “in all other cases in which he would be liable, if such plaintiff “were suing in his own right, upon a cause of action accruing to “himself; and the defendant shall have judgment for such costs, “and they shall be recovered in like manner.”

Previously to the above act, it was holden that where, in *assump-*

Executors and administrators not formerly liable to costs, when plaintiffs, on nonsuit or verdict against them, where they necessarily sued in their representative character.

Aliter, when they might have sued in their own right.

Must now pay costs, on nonsuit or verdict, &c., when suing in right of testator or intestate.

Costs on *nolle prosequi*.

^a See the cases referred to in Tidd *id.* 893.
Prac. 9 Ed. 978.

^b *Id. ib.* and see *Dowbiggin v. Harrison*, 9 Barn. & C. 666. 4 Man. & R. 622. S. C. 10 Barn. & C. 480. S. C. cited. *Tomlinson v. Nanny*, 6 Leg. Obs. 157, 8. Excheq. *Jobson v. Forster*, 1 Barn. & Ad. 6. and *Slater v. Lawson*,

^c 3 & 4 W. IV. c. 42. § 31. and see 3 Rep. C. L. Com. 61. 86: and for the cases in which executors and administrators were or were not liable to costs, when plaintiffs, before the 3 & 4 W. IV. c. 42, see Tidd *Prac.* 9 Ed. 978, 9.

- CHAP. XL. *sit* against two defendants, one of them pleaded his bankruptcy, and the plaintiff entered a *nolle prosequi* as to him, and proceeded to trial, and obtained a verdict against the other defendant, who pleaded the general issue, the former was not entitled to costs^a; and that where a *nolle prosequi* was entered on any of the counts in a declaration, the plaintiff was not entitled to costs on such counts^b.
- As to one or more of several defendants. But now, by the statute 3 & 4 W. IV. c. 42^c, "where several persons shall be made defendants in any personal action, and any one or more of them shall have a *nolle prosequi* entered as to him or them, every such person shall have judgment for, and recover his reasonable costs." And "where any *nolle prosequi* shall have been entered upon any count, or as to part of any declaration, the defendant shall be entitled to, and have judgment for, and recover his reasonable costs in that behalf."^d
- On any count, or part of a declaration. By the statute 8 & 9 W. III. c. 11.^e "where several persons shall be made defendants to any action of *trespass*, *assault*, *false imprisonment*, or *ejectione firmæ*, and any one or more of them shall be, upon the trial thereof, acquitted by verdict, every person so acquitted shall recover his costs of suit, in like manner as if a verdict had been given against the plaintiff, and acquitted all the defendants; unless the judge, before whom the cause is tried, shall, immediately after the trial thereof, in open court, certify upon the record, under his hand, that there was a reasonable cause for making such person a defendant." This statute was confined to the particular actions mentioned therein; and did not extend to an action of *trespass* upon the *case*^f, nor consequently to an action of *trover*^g; neither did it extend to an action of *replevin*^h; nor to an action of *debt* on bond against executors, one of whom was acquitted on a plea of *plene administravit præter*ⁱ.
- Costs, when one of several defendants is acquitted, by stat. 8 & 9 W. III. c. 11. § 1. But now, by the late act for the further amendment of the law^k, &c. "where several persons shall be made defendants in any personal
- One or more of several defendants, in any per-

^a *Harewood v. Matthews*, H. 56 Geo. III. K. B. *Booth v. Middlecoat*, 4 Moore & P. 182. 6 Bing. 445. S. C.

^b *Hubbard v. Biggs*, 16 East, 129.

^c § 32.

^d § 33. And as to the costs on a *nolle prosequi*, see *Tidd Prac.* 9 Ed. 681, 2. 981.

^e § 1. and see *Tidd Prac.* 9 Ed. 986.

^f *Dibben v. Cooke*, 2 Str. 1005. and see *Murray v. Nichols*, 6 Bing. 530. 4 Moore & P. 280. S. C.

^g *Poole v. Boulton, Barnes*, 189.

^h *Ingles v. Wadworth*, 3 Bur. 1234.

ⁱ Bl. Rep. 355. Say. Costs, 215. S. C.

^j *Duke of Norfolk v. Anthony*, E. 42 Geo. III. K. B.

^k 3 & 4 W. IV. c. 42. § 32.

"action, and any one or more of them shall, upon the trial of such action, have a verdict pass for him or them, every such person shall have judgment for and recover his reasonable costs, unless the judge, before whom such cause shall be tried, shall certify upon the record, under his hand, that there was a reasonable cause for making such person a defendant in such action."

sonal action, to have costs on verdict, unless the judge shall certify that there was a reasonable cause for making them defendants.

By another clause of the statute 8 & 9 W. III. c. 11.^a, it is enacted, that "if any person shall commence or prosecute any action, in any court of record, wherein, upon *demurrer* either by plaintiff or defendant, demandant or tenant, judgment shall be given by the court against the plaintiff or demandant, the defendant or tenant shall have judgment to recover his costs, and have execution for the same by *capias ad satisfaciendum, fieri facias, or elegit*." This clause of the statute did not extend to demurrers to pleas in abatement^b; nor, as it seems, to any action wherein the defendant would not have been entitled to costs, upon a nonsuit or verdict^c. And where, in an action for a libel against ten defendants, three of them demurred to some of the counts of a declaration, and the other defendants went to issue thereon, and all the defendants went to issue upon the other counts, and those defendants who demurred got judgment upon the demurrer, before the issues were tried; the court held, that they were not entitled to have their costs taxed upon that judgment, under the above statute^d. But now, by the law amendment act^e, "where judgment shall be given, either for or against a plaintiff or demandant, or for or against a defendant or tenant, upon any demurrer joined in any action whatever, the party in whose favour such judgment shall be given, shall also have judgment to recover his costs in that behalf."

Costs on demurrer, by stat. 8 & 9 W. III. c. 11. § 2.

Plaintiff or defendant, in all cases, to have costs on demurrer.

By another clause of the statute 8 & 9 W. III. c. 11.^f it is enacted, that "in all suits upon any writ or writs of *scire facias*, the plaintiff obtaining an award of execution, after plea pleaded, or demurrer joined therein, shall recover his costs of suit." This clause

Costs, upon writs of *scire facias*.

^a § 2.

⁴. *contra*.

^b *Michlam v. Bate*, 8 Barn. & C. 642.
³ *Man. & R.* 91. S. C. and see *Tidd*
Prac. 9 Ed. 982.

^d *Forbes v. Gregory*, 1 *Cromp. & M.*
435. 1 *Dowl. Rep.* 679. S. C.

^e *Miller v. Seagrave*, *Cas. Pr. C. P.*
25. *Thrale v. Bishop of London*, 1 *H.*
Blac. 530. but see *Anon. Cas. Pr. C. P.*

^e 3 & 4 W. IV. c. 42. § 34.; and see
3 *Rep. C. L. Com.* 25. 76. *Tidd Prac.*
9 Ed. 982.

^f § 3.

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of the statute was extended by the late act for the further amendment of the law^a, &c., by which it is enacted, that "in all writs of *scire facias*, the plaintiff obtaining judgment, *on*^b an award of "execution, shall recover his costs of suit, upon a judgment by default, as well as upon a judgment after plea pleaded, or demurrer "joined."

By whom, and
how costs are
taxed.

Judges em-
powered to make
regulations, for
taxing costs by
the officers of
each court indis-
criminately.

Costs are taxed by the master, in the King's Bench and Exchequer, or prothonotaries in the Common Pleas, upon a bill made out by the attorney for the prevailing party; or, more frequently, without a bill, upon a view of the proceedings^c. But, by the statute 3 & 4 W. IV. c. 42.^d, reciting that it would tend to the better dispatch of business, and would be more convenient, and better assimilate the practice, and promote uniformity in the allowance of costs, if the officers on the plea side of the courts of King's Bench and Exchequer, and the officers of the court of Common Pleas at *Westminster*, who now perform the duties of taxing costs, were to be empowered to tax costs which have arisen, or may arise, in each of the said courts indiscriminately; it is enacted, that "it shall be lawful for the judges of the said courts, or any "eight or more of them, of whom the chief of each of the said "courts shall be *three*, by any rule or order to be from time to "time made, in term or vacation, to make such regulations for the "taxation of costs, by any of the said officers of the said courts "indiscriminately, as to them may seem expedient, although such "costs may not have arisen in respect of business done in the "court to which such officer belongs, and to appoint some convenient place in which the business of taxation shall be transacted "for all the said courts, and to alter the same, when and as it may "seem to them expedient."

^a 3 & 4 W. IV. c. 42. § 34.; and see Tidd *Prac.* 9 Ed. 1132.

^b *Sic* in printed copy of act, instead of or.

^c Tidd *Prac.* 9 Ed. 989.

^d § 36. And see further, as to *final* costs, Tidd *Prac.* 9 Ed. Chap. XL. p. 945, &c.; and as to *interlocutory* costs, on motions, &c. see the *Index* thereto, tit. *Costs*, p. 1322, 3.

CHAP. XLI.

Of the TESTE and RETURN of WRITS of EXECUTION; the LIABILITY of the SHERIFF, &c. for GOODS taken in EXECUTION, after an ACT of BANKRUPTCY; and the RELIEF he is entitled to, under the INTERPLEADER ACT.

AT common law, writs of execution must have been *tested* in term time^a, on a day after the judgment was, or might be supposed to have been given: But, by the statute 1 W. IV. c. 7^b, "every execution, issued by virtue of that act, shall and may bear *teste* on the day of issuing thereof; and such execution shall be as valid and effectual, as if the same had been issued according to the course of the common law."^c And, by a subsequent statute^d, "all writs of execution may be *tested* on the day on which the same are issued, and be made returnable immediately after the execution thereof." A writ of execution, however, cannot be *tested* of a term previous to the judgment, although it be issued under the above statutes^e.

Teste and return of writs of execution.
By stat. 1 W. IV. c. 7.

The liability of the sheriff, and his officers, to answer for the value of goods taken in execution, or their proceeds, principally depends on whether, at the time of taking them, they were the goods of the defendant, or a third person; and, if the defendant has become bankrupt, whether he had committed an act of bankruptcy before the sheriff's entry under the execution: For if a writ of execution be delivered to the sheriff against *A.*, who becomes bankrupt before it is executed, the execution is superseded; con-

Liability of sheriff, &c. for goods taken in execution.

^a *Shirley v. Wright*, 2 Salk. 700. 2 Ld. Raym. 775. S. C.

^b § 3.

^c *Aule*, 132.

^d 3 & 4 W. IV. c. 67. § 2.

^e *Englehart v. Dunbar*, 6 Leg. Obs. 237. *per Patterson, J.*

CHAP. XLI. subsequently, the property of the goods is not absolutely bound, as in other cases ^a, by the delivery of the writ to the sheriff, but by its actual execution ^b. And where goods are seized under a *feri facias*, the same day that the defendant commits an act of bankruptcy, evidence should be given to prove at what time of the day the goods were seized, and the act of bankruptcy was committed ^c.

Sheriff liable in trover, for goods taken in execution after an act of bankruptcy, though he has no notice of it.

Alien, in trespass.

Trover against late, or present sheriff.

A sheriff, who takes in execution the goods of a trader, after he has committed an act of bankruptcy, is liable in *trover* to his assignees, for the value of the goods, although he has no notice of the act of bankruptcy, and a commission has not been sued out thereon, at the time of the execution ^d. And if a sheriff take in execution the goods of a defendant, who afterwards becomes bankrupt, and sell at one time, after the bankruptcy, sufficient goods to satisfy both that execution, and also another which was delivered to him after an act of bankruptcy, the assignees may recover against him in *trover*, for such of the goods as were sold after he had raised money enough to satisfy the first execution ^e. But *trespass* will not lie by the assignees of a bankrupt, against a sheriff, for taking the bankrupt's goods in execution, after an act of bankruptcy, and before the issuing of the commission, notwithstanding he sells them after the issuing of the commission, and after a provisional assignment, and notice from the provisional assignee not to sell ^f. In *trover* by the assignees of a bankrupt, for goods taken by the sheriff under an

^a Tidd *Prac.* 9 Ed. 1000.

^b *Smallcomb v. Cross*, 1 Ld. Raym. 252. *per Holt*, Ch. J.; and see 2 Eq. Cas. Ab. 381. *Coppingdale v. Bridgen*, 2 Ken. 542.

^c *Sadler v. Leigh*, 4 Campb. 197.

^d *Price v. Helyar*, 4 Bing. 597. 1 Moore & P. 541. S. C.; and see *Cooper v. Chitty*, 1 Ken. 395. 1 Bur. 20. 1 Blac. Rep. 65. S. C. *Hitchin (or Kitchen) v. Campbell*, 2 Blac. Rep. 827. 829. 3 Wils. 304. S. C. *Aldridge v. Ireland*, 1 Taunt. 273. 2 Crompt. & J. 34, 5. *Lazarus v. Waithman*, 5 Moore, 313. *Dillon v. Edwards*, 2 Moore & P. 550. *Vaughan v. Wilkins*, 1 Barn. & Ad. 370. *Carlisle v. Garland*, 5 Moore & P. 102. 7 Bing. 298. S. C. *Dillon v. Langley*, 2 Barn. & Ad.

131; and see *id.* 135. (a.) *Young v. Marshall*, 8 Bing. 43. 1 Moore & S. 116. S. C. *Crosfield v. Stanley*, 4 Barn. & Ad. 87: but see *Timbrell v. Mills*, 1 Blac. Rep. 205. 2 Crompt. & J. 34, 5. S. C. cited. *Balme v. Hutton*, 2 Crompt. & J. 19. 2 Tyr. Rep. 17. S. C. *semb. contra.* The judgment however, of the court of Exchequer, in the latter case, was reversed, on a writ of error, by a majority of the judges in the Exchequer Chamber. 3 Moore & S. 1. 9 Bing. 471. 1 Crompt. & M. 262. 2 Tyr. Rep. 620. S. C. 4 Barn. & Ad. 90. (a.)

^e *Stead v. Gascoigne*, 8 Taunt. 527.

^f *Smith v. Milles*, 1 Durnf. & E. 475. and see *Hitchin v. Campbell*, 2 Blac. Rep. 629. *Ward v. Clarke*, 1 Moody & M. 497. *per Ld. Tenterden*, Ch. J.

execution, it appeared that the goods were taken about the time of the year at which the sheriffs were changed, and that a witness, after the present cause was set down for trial, saw a form of return indorsed on the writ, which had never been returned : This form of return was signed by the defendant as sheriff ; and it was ruled at *nisi prius*, to be sufficient evidence that he was the sheriff who executed the writ ; and that if the writ, when produced at the trial, had his name erased, and the name of the previous sheriff substituted, it would be a question for the jury, whether the substitution was made to correct a mistake, or to defeat the plaintiff^a.

It should be observed, however, that by the statute 6 Geo. IV. c. 16.^b “ all executions against the goods and chattels of any bankrupt, *bona fide* executed or levied more than *two* calendar months before the issuing of the commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed : Provided the person or persons, at whose suit such execution shall have issued, had not, at the time of executing or levying the same, notice of any prior act of bankruptcy by him committed.”

Executions levied, without notice, &c., more than two calendar months before commission, valid.

But, by a subsequent clause of the same statute^c, “ no creditor having security for his debt, or having made any attachment in London, or any other place, by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive, upon any such security or attachment, more than a rateable part of such debt, except in respect of any execution or extent served and levied by seizure upon, or any mortgage of or lien upon, any part of the property of such bankrupt, before the bankruptcy : Provided, that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution, to the prejudice of other fair creditors, but shall be paid rateable with such creditors.” Therefore, where *A.* obtained a judgment, by confession or *nil dicit*, against *B.*, and issued a *fiery facias*, under which *B.*'s goods were seized ; and whilst the goods remained unsold in the sheriff's hands, *B.* committed an act of bankruptcy, on which a commission was issued ; and the sheriff, after notice of the commission, sold the goods, and paid over the

Creditor having security for his debt, not to receive more than other creditors.

Proviso as to execution, on judgment by default, &c.

To what cases statute applies.

^a Whitehouse v. Atkinson, 3 Car. & 121. § 2.

P. 344. per *Ld. Tenterden*, Ch. J. ^c § 108.

^b § 81. and see stat. 49 Geo. III. c.

CHAP. XLI. proceeds to *A.*; it was holden, that the amount might be recovered from the sheriff, by the assignee of *B.*, as money had and received to his use ^a. And an execution on a final judgment, following a judgment by *nil dicit* in *assumpsit*, was holden to be within the proviso of the 6 Geo. IV. c. 16. § 108. although there was no concert between the parties, and the judgment was obtained before the act came into operation ^b.

To what not.

The above clause, however, only applied to creditors having security for their debts, at the time of the bankruptcy: And therefore, where *A.* having a debt from *B.*, secured to him by warrant of attorney, entered up judgment by *non sum informatus*, issued ^a *feri facias*, and took from the sheriff a bill of sale of the goods seized; and *B.* having soon afterwards become bankrupt, his assignees took possession of and sold the goods so transferred to *A.*, who brought an action of *trover* for them; the court held, that he was not a creditor, having security for his debt, within the above statute, and that he was entitled to recover ^c. So, where judgment was entered up on a warrant of attorney, given by two joint traders, and a *feri facias* issued, returnable on the second of May; on the first of that month, the sheriff's officer received from the defendant the money directed to be levied; on the 2d of May, one of them committed an act of bankruptcy, and the other on the fifth: on the eleventh, a commission of bankrupt issued; and on the 19th, the sheriff paid over the money to the execution creditor; the court held, in an action by the assignees, that such creditor was entitled to retain it, not being a creditor having a security at the time of the bankruptcy ^d. And it seems to be now settled, by the above and other cases, that where goods are taken and sold by the sheriff, before an act of bankruptcy, under a *feri facias*, on a judgment obtained by default, confession, or *nil dicit*, the execution creditor is entitled to the proceeds, though they still remain in the hands of the sheriff ^d; and even though the act of

^a Notley v. Buck, 2 Man. & R. 68.
8 Barn. & C. 160. S. C.

Cuming v. Welsford, 6 Bing. 502.
4 Moore & P. 238. S. C.

^c Wymer v. Kemble, 6 Barn. & C.
479. 9 Dowl. & R. 511. S. C. and see
Taylor v. Taylor, 5 Barn. & C. 392. 8

Dowl. & R. 159. S. C. *In re Wash-*
bourn, 8 Barn. & C. 444. 2 Man. & R.
374. S. C. Godson v. Sanctuary, 1 Nev.
& M. 52.

^d Morland v. Pellatt, 8 Barn. & C.
722. 3 Man. & R. 411. S. C.

bankruptcy was committed before the return of the writ^a. In CHAP. XLI. the latest case upon the subject^b, where the sheriff, under a *feri facias*, upon a judgment founded on a warrant of attorney, seized at eleven o'clock on the 13th August, and a commission of bankruptcy issued against the debtor at a later hour of the 13th October, in the same year; and the sale took place subsequently to the issuing of the commission; it was holden first, that the seizure was a *levying*, within 6 Geo. IV. c. 16. § 81; secondly, that more than two calendar months had elapsed, between the seizure and the issuing of the commission; and thirdly, that the 108th section of the statute applied only to judgments upon which execution had been sued out, and seizure made, within two calendar months before the issuing of the commission, and not to any case protected by the 81st section. And now, by the statute 1 W. IV. c. 7^c. "no judgment signed, or execution issued, after the passing of that act, on a *cognovit actionem* signed after declaration filed or delivered, or judgment by default, confession, or *nihil dicit*, according to the practice of the court, in any action commenced adversely, and not by collusion, for the purpose of fraudulent preference, shall be deemed or taken to be within the provision of 6 Geo. IV. c. 16."^d This statute, however, does not extend to judgments on warrants of attorney, though given without collusion, or intention of fraudulent preference^e.

By stat. 1
W. IV. c. 7.
§ 7.

Having considered, in a preceding chapter^f, such of the provisions of the *Interpleader* act^g, as relate to the property in money or goods, where claims are made by different parties, one of whom has brought an action against the person in possession of them, and the defendant does not claim any interest therein; it may here be proper to notice those which are calculated for the relief of *sheriffs*, and other officers, in execution of process against goods and chattels.

Provisions of
stat. 1 & 2 W.
IV. c. 58. § 6.
for relief of
sheriffs, &c.

^a *Higgins v. M'Adam*, 3 Younge & J. 1. *Id.* 16, 17, 18. *in notis.* Fox v. Burbridge, H. 9 & 10 Geo. IV. K. B. 3 Younge & J. 18. *in notis.*

^b *Godson v. Sanctuary*, 1 Nev. & M. 52.

^c § 7.

^d § 108. and see 4 Leg. Obs. 205. (i.) Tidd *Prac.* 9 Ed. 570. 1009, 10.

^e *Crosfield v. Stanley*, 4 Barn. & Ad. 87.

^f Chap. XX. p. 128, &c.

^g 1 & 2 W. IV. c. 58. § 1, &c.

Relief of sheriff, &c. at common law, by enlarging time for making his return.

Previously to this statute, if the property of goods had been disputed, which frequently happened, on a commission of bankrupt, &c., the courts, on the suggestion of a reasonable doubt, would have protected the sheriff, by enlarging the time for making his return, till the right were tried between the contending parties, or one of them had given him a sufficient indemnity^a. The rule for this purpose was a rule to shew cause^b. And the court of King's Bench, upon the application of the sheriff, enlarged the time for his making a return to a writ of *feri facias*, upon suggestion of a reasonable doubt, whether the goods seized under the writ, were not bound by an *extent* afterwards issued, at the suit of the crown, for malt duties; for the purpose of inducing the plaintiff to go into the court of Exchequer, and there contest the question of right with the crown, in a more eligible manner than in that court^c. So, where it appeared by *affidavit*, that writs of extent and *feri facias* had been issued on the same day, the court of King's Bench, for protecting the sheriff, refused to allow a *venditioni exponas* to be issued, on the return of the *feri facias*, to compel him to sell the goods under it^d. So, where a bankrupt brought one action, and his assignees another, against the sheriff, the court allowed the latter to pay the money levied into court, and stayed the proceedings, until the trial of an issue between the bankrupt and his assignees^e. And, in general, when an action was brought against the sheriff, by the assignees of a bankrupt, for taking goods in execution after a bankruptcy, the courts would

^a *Sample v. Ld.* Newhaven, M. 24 Geo. III. K. B.; and see *Wilson v. Aldridge*, 8 Mod. 315. *Timbrell v. Mills*, 1 Blac. Rep. 205, 6. *Shaw v. Tunbridge*, 2 Blac. Rep. 1064. *Raines v. Nelson*, *id.* 1181. *Wheeler v. Bramah*, 3 Campb. 340. *per Ld. Ellenborough*, Ch. J. *Keightley v. Birch*, *id.* 523. *per Ld. Ellenborough*, Ch. J. *Barnard v. Leigh*, 1 Stark. Ni. Pri. 45. *per Ld. Ellenborough*, Ch. J. *Ledbury v. Smith*, 1 Chit. Rep. 294. *Rex v. Sheriff of Devon*, *id.* 643. *Etchels v. Lovatt*, 9 Price, 54. *Burr v. Freethy*, 1 Bing. 71. *Bernasconi v. Fairbrother*, 7 Barn. & C. 379. *Beavan v. Dawson*, 6 Bing. 566.

⁴ *Moore & P.* 387. S. C. *Ibberson v. Dicas*, 1 Leg. Obs. 109. *per Littledale*, J. *Same v. Same*, *id.* 398. *per Taunton*, J. *Solari v. Randall*, *id.* 159. *per Littledale*, J. *Anon.* 2 Leg. Obs. 334. *per Taunton*, J.

^b *Ledbury v. Smith*, 1 Chit. R. 294.

^c *Wells v. Pickman*, 7 Durnf. & E. 174. *Thurston v. Thurston*, 1 Taunt. 120. *accord.*

^d *Anon.* 1 Chit. Rep. 643. a.; and see *Anon.* 2 Chit. R. 390. *Swain v. Morland*, Gow, 39. 1 Brod. & B. 370. S. C. *Rex v. Cooke*, 1 M'Clel. & Y. 196.

^e *Jones v. Perry*, T. 21 Geo. III. K. B.

assist the sheriff, by staying the proceedings until he was indemnified, on proper and equitable terms ^a: and, in one case ^b, the terms imposed by the court of King's Bench were, the sheriff's paying over the money levied to the assignees, with the costs of the action up to that time, being allowed his poundage, and the expences incurred in the execution. But the costs of applying to the court, for enlarging the time for making his return, were not, in general, allowed him ^c. CHAP. XLI.

At length, by the above statute ^d, reciting that whereas difficulties sometimes arose in the execution of process against goods and chattels, issued by or under the authority of the courts therein mentioned, by reason of claims made to such goods and chattels by assignees of bankrupts, and other persons, not being the parties against whom such process issued, whereby sheriffs and other officers were exposed to the hazard and expence of actions; and it was reasonable to afford relief and protection in such cases, to such sheriffs and other officers; it is enacted, that "when any such claim shall be made to any goods or chattels taken, or intended to be taken, in execution under any such process, or to the proceeds or value thereof, it shall and may be lawful to and for the court from which such process issued, upon application of such sheriff or other officer, made before or after the return of such process, and as well before as after any action brought against such sheriff or other officer, to call before them, by rule of court ^e, as well the party issuing such process, as the party making such claim; and thereupon to exercise, for the adjustment of such claims, and the relief and protection of the sheriff or other officer, all or any of the powers and authorities thereinbefore contained, and make such rules ^e and decisions as shall appear

Relief of sheriff, and other officers, in execution of process against goods and chattels, by stat. 1 & 2 W. IV. c. 58. § 6.

^a *M'George v. Birch*, 4 Taunt. 585. *Obs.* 334. *per Taunton, J.*: but see *Butler v. Butler*, 1 East, 338. *Parker v. Pistor*, 3 Bos. & P. 288. *Hartley v. Stead*, 8 Moore, 466. *Colley v. Hardy*, 5 Man. & R. 123.

^b *Probinia v. Roberts*, 1 Chit. R. 577. and see *id.* 643. *a.*

^c *Rex v. Cooke*, 1 M'Clel. & Y. 198, 9. and see *Tidd Prac.* 9 Ed. 1017, 18.

^d 1 & 2 W. IV. c. 58. § 6.

^e For rules of court on this statute, see *Append. to Chap. XLI.* § 1, &c.

^a *King v. Bridges*, 7 Taunt. 294. 1. *Moore*, 43. S. C. *Probinia v. Roberts*, 1 Chit. R. 577. *Id.* 643. (*a.*) *Anon.* 2 Chit. R. 204. *Venables v. Wilks*, 4 Moore, 339. *Bernasconi v. Fairbrother*, 7 Barn. & C. 379. *Beavan v. Dawson*, 6 Bing. 566. 4 Moore & P. 367. S. C. *Ibberson v. Dicus*, 1 Leg. Obs. 109. *per Littledale, J.* *Same v. Same*, *id.* 396. *per Taunton, J.* *Solari v. Randall*, *id.* 159. *per Littledale, J.* *Anon.* 2 Leg.

CHAP. XLI. "to be just, according to the circumstances of the case; and the
 "costs of all such proceedings shall be in the discretion of the
 "court."

To what cases
 statute applies.

This statute, which was intended to afford relief and protection to sheriffs and other officers, extends to all cases where any claim is made to goods or chattels taken, or intended to be taken, in execution, under any process issued by or under the authority of any of his majesty's courts of law at *Westminster*, or the court of Common Pleas of the county palatine of *Lancaster*, or the court of Pleas of the county palatine of *Durham*: And, under this statute, where process is issued out of different courts, and directed to the same sheriff, the latter must apply for relief to the respective courts out of which the process issues^a. But cause cannot be shewn against the rule at chambers: for although the *first* section of the act gives such power to a single judge, yet by the *sixth* section it is granted to the court only^b. The courts will relieve the sheriff, under the above statute, in the case of a conflicting claim on property seized by him, though that claim be only of a lien on the property^c. But where the sheriff had levied under a *feri facias*, and, while in possession, he received notice that other writs of execution had been issued against the defendant's goods, and that the first execution creditor was not entitled to the whole proceeds of the levy, the court held that the sheriff was not entitled to relief under the above statute^d. In order to entitle him to relief under the interpleader act, it must not only appear that a claim has been made, but also that there has been something done on the part of the alleged claimants, which shews that they intend to enforce their claims against the property seized^e. And, if he wish to obtain relief under it, he must come to the court promptly; and no supplemental *affidavit*, explaining his delay, will be allowed, when cause is shewn against the rule^f: It also seems, that the sheriff ought to deny *collusion* with any of the parties^g. The inter-

To what not.

^a *Bragg v. Hopkins*, 6 Leg. Obs. 18. *per Paterson, J.*

^b *Shaw v. Roberts, id.* 444, 5. Excheq.

^c *Ford v. Baynton*, 1 Dowl. Rep. 357. 4 Leg. Obs. 125. S. C. *per Taunton, J.*

^d *Salmon v. James*, 1 Dowl. Rep.

369. Anon. 4 Leg. Obs. 141. S. C. *per Taunton, J.*; and see *Day v. Waldock*, 1 Dowl. Rep. 523. 5 Leg. Obs. 427, 8. S. C. *per Parke, J.*

^e *Isaac v. Spilsbury*, 10 Bing. 3.

^f *Cooke v. Allen*, 6 Leg. Obs. 221. Excheq.

pleader act does not apply to claims in equity^a: and a sheriff is not entitled to relief, under that act, where he has paid over the proceeds of the execution to the judgment creditor^b. CHAP. XLI.

In cases to which the statute applies, the court from which the process issued is authorized thereby, upon application of the sheriff or other officer, founded on an *affidavit* of the circumstances^c, to call before them, by rule of court, as well the party issuing such process, as the party making such claim; and thereupon to exercise, for the adjustment of such claims, and the relief and protection of the sheriff or other officer, all or any of the powers and authorities thereinbefore contained; and make such rules and decisions as shall appear to be just, according to the circumstances of the case. In the exercise of these powers and authorities, if the parties appear, the court, with the consent of the plaintiff and party making the claim, their counsel or attornies, will either dispose of the merits of their claims, and determine them in a *summary* manner^d; or, which more frequently happens, will order the question of property to be tried in an action, or on one or more *feigned* issue or issues, and direct which of the parties shall be plaintiff or defendant on such trial^e. In these cases, the court will order the proceedings against the sheriff to be stayed, until the trial of the action, or feigned issue; and, in the mean time, give such directions respecting the sale of the goods, and the application of the proceeds or value thereof, as shall appear to be just, according to the circumstances of the case. In a late case, where the sheriff had seized goods under a *feri facias*, and afterwards received notice, before sale, of the landlord's claim for rent in arrear, and afterwards of a *stat* of bankruptcy; the court held, that the assignees were entitled to the goods, the landlord not having made

Proceedings in cases to which it applies.

On appearance of parties.

In a summary way.

By action, or feigned issue.

Staying proceedings against sheriff, &c.

^a *Sturgess v. Claude*, 1 Dowl. Rep. 357. 4 Leg. Obs. 125. S. C. 505. *per Patteson, J.*

^b *Anderson v. Calloway*, 1 Cromp. & M. 182. 1 Dowl. Rep. 636. S. C. *Chalton v. Anderson*, 3 Tyr. Rep. 237. and see *Devereux v. John*, 1 Dowl. Rep. 548. 5 Leg. Obs. 431. S. C. *per Parke, J.*

^c For the form of this affidavit, see *Northcote v. Beauchamp*, 1 Moore & S. 158. 8 Bing. 66. S. C.

^d *Ford v. Baynton*, 1 Dowl. Rep. 357. 4 Leg. Obs. 125. S. C.

^e *Badcock v. Beauchamp*, 3 Leg. Obs. 66. 8 Bing. 86. S. C. cited. *Parker v. Booth*, 1 Moore & S. 156. 8 Bing. 85. S. C. *Northcote v. Beauchamp*, 1 Moore & S. 158. 8 Bing. 86. S. C. *Barker v. Dynes*, 1 Dowl. Rep. 169. 3 Leg. Obs. 310. S. C. *Slowman v. Back*, 3 Barn. & Ad. 103; and for the form of the rule, see *Parker v. Booth*, 1 Moore & S. 156. 8 Bing. 65. S. C. Append. to Chap. XLI. § 1, &c.

When the claimant does not appear.

Sheriff's right to poundage.

To costs.

Rules and orders, &c. may be entered of record, and made evidence.

a distress for his rent^a. When an adverse claim is set up to goods seized by the sheriff, and the latter applies to the court for relief under the above statute, and the adverse party does not appear to support his claim, the court will bar his claim as to the sheriff, and make him pay the judgment creditor his costs of appearing on the sheriff's rule^b: In other cases, the costs of the proceedings are declared to be in the discretion of the court. The sheriff's right to *poundage* depends upon the event of the application, or suit; and if that be determined in favour of the execution creditor, the sheriff will of course be entitled to his poundage, but otherwise not^c: And as the sheriff, before the statute, was not entitled to the costs of applying to the court, for enlarging the time to make his return^d, so he is not entitled, under the statute, to the costs of the application^e. But where a *feri facias* having issued, goods were seized under it, and, an adverse claim being set up, the sheriff applied for relief under the above act, and the execution creditor did not appear to support his *feri facias*; the court granted the costs of the adverse claimant's appearing to support his claim, to be paid by the execution creditor, but not those of the sheriff^f: If the execution creditor, however, afterwards appear, and open the rule, the court will grant the sheriff the costs of his second appearance^g.

To give effect to the provisions of the above statute, it is thereby further enacted, that "all rules, orders, matters, and decisions, to be made and done in pursuance of that act, except only the *affidavits* to be filed, may, together with the declaration in the cause, (if any,) be entered of record^h, with a note in the margin, expressing the true date of such entry, to the end that the same may be evidence in future times, if required, and to secure and enforce

^a Gethin v. Wilks, 6 Leg. Obs. 237. *per Taunton, J.*

^b Bowdler v. Smith, 1 Dowl. Rep. 417. 4 Leg. Obs. 187. S. C. Perkins v. Benton, 3 Tyr. Rep. 51. Towgood v. Morgan, *id.* 52. (a.)

^c Badcock v. Beauchamp, 3 Leg. Obs. 66. 8 Bing. 86. S. C. cited. Parker v. Booth, 1 Moore & S. 156. 8 Bing. 85. S. C. Northcote (or Northcott) v. Beauchamp, 1 Moore & S. 158. 8 Bing. 86. S. C. Barker v. Dynea, 1 Dowl. Rep. 169. 3 Leg. Obs. 310. S. C. Bowdler

v. Smith, 1 Dowl. Rep. 417. 4 Leg. Obs. 187. S. C. Field v. Cope, 2 Tyr. Rep. 458. 2 Crompt. & J. 480. 1 Dowl. Rep. 567. S. C. Seaward v. Williams, 1 Dowl. Rep. 528. 5 Leg. Obs. 427. S. C. *per Parke, J.* Morland v. Chitty, 1 Dowl. Rep. 520. 5 Leg. Obs. 428. S. C. *per Parke, J.*

^d *Ante*, 189.

^e Bryant v. Ikey, 1 Dowl. Rep. 428. 4 Leg. Obs. 284. S. C. *per Patteson, J.*

^f Append. to Chap. XLI. § 8, 9.

"the payment of costs directed by any such rule or order; and
 "every such rule or order, so entered, shall have the force and
 "effect of a judgment, except only as to becoming a charge on any
 "lands, tenements, or hereditaments; and in case any costs
 "shall not be paid within *fifteen* days after notice of the taxation
 "and amount thereof given to the party ordered to pay the same,
 "his agent or attorney, execution may issue for the same, by *feri*
 "*facias*", or *capias ad satisfaciendum*^b, adapted to the case,
 "together with the costs of such entry, and of the execution, if by
 "*feri facias*; and such writ and writs may bear *teste* on the day
 "of issuing the same, whether in term or vacation; and the sheriff,
 "or other officer, executing any such writ, shall be entitled to the
 "same fees, and no more, as upon any similar writ grounded upon
 "a judgment of the court."^c

Force and effect
of rule or order.

Execution for
costs.

Teste of writs.
Sheriffs' fees.

^a Append. to Chap. XLI. § 10.

as to the sheriff's fees on an execution,
see Tidd *Prac.* 9 Ed. 1039.

^b *Id.* § 11.

^c Stat. 1 & 2 W. IV. c. 58. § 7; and

CHAP. XLV.

Of the Action of EJECTMENT.

THE action of *ejectment*, we have seen^a, is, in point of form, a
personal action of *trespass*; but, in effect, it is a *mixed* action, by
 which a lessee for years, when ousted of his possession, may recover
 his term, and damages. An *ejectment* being excepted out of the
 statute 3 & 4 W. IV. c. 27. § 36.^b may still be brought, for the
 recovery of the possession of lands, &c.: And as it is not affected
 by the uniformity of *process* act^c, it may be *commenced*, as before
 that act, either by *original* writ, in the King's Bench or Common
 Pleas, or by *bill* in the King's Bench, or Exchequer of Pleas^d.

What.

Excepted out of
stat. 3 & 4 W.
IV. c. 27.

Not affected by
uniformity of
process act.

^a *Ante*, 11. And for the nature of
the action of *ejectment*, when and for
what things it will lie, and for what not,
and by and against whom it is brought,
and the proceedings therein, see Tidd

Prac. 9 Ed. 1189, &c.

^b *Ante*, 13.

^c 2 W. IV. c. 39.

^d *Ante*, 62.

Within what
time it must be
brought.

This action, being founded on a right of entry, must be brought, by the statute 21 Jac. 1. c. 16. § 1. within *twenty* years after the right of entry accrued^a; or, in case of an adverse possession, it may be barred by that statute: And as it is an action relating to *real* property, it will be governed by the statute 3 & 4 W. IV. c. 27.^b; by which it is enacted, that “after the 31st day of *December* 1833, “no person shall bring an action to recover any land, but within “*twenty* years next after the time at which the right to bring such “action shall have first accrued, to some person through whom he “claims; or, if such right shall not have accrued to any person “through whom he claims, then within *twenty* years next after the “time at which the right to bring such action shall have first ac- “crued to the person bringing the same.”

Alterations in.

In this action, several important alterations have been made, during the present reign, which it may be proper to notice in this chapter, under the following heads: 1. The proceedings by landlord against tenant, when the tenancy expires, or right of entry accrues, in or after *Hilary* or *Trinity* terms: 2. The title and commencement of the declaration: 3. The service thereof: 4. The certificate of the judge who tried the cause, for an immediate writ of possession: 5. The mode of suing it out: and lastly, the recognizance of bail in error.

Proceedings in,
by landlord
against tenant,
on stat. 11 Geo.
IV. and 1 W.
IV. c. 70. § 36.
when tenancy
expires, or right
of entry accrues,
in or after
Hilary or
Trinity terms.

By the late act for the more effectual administration of justice, in *England* and *Wales*^c, reciting that whereas landlords, to whom a right of entry into or upon any lands or hereditaments may accrue, during or immediately after *Hilary* and *Trinity* terms respectively, were unable to prosecute ejectments against their tenants, so as to try the same at the assizes immediately ensuing, whereby much delay was occasioned in the recovery of the possession of lands and tenements, wrongfully withheld by tenants against their landlords; it is enacted, that “in all actions of *eject- ment* thereafter to be brought, in any of his majesty’s courts at “*Westminster*, by any landlord against his tenant, or against any “person claiming through or under such tenant, for the recovery “of any lands or hereditaments, where the tenancy shall expire, or “the right of entry into or upon such lands or hereditaments shall “accrue to such landlord, in or after *Hilary* or *Trinity* terms re-

^a *Ante*, 19, 20.

crued, in different cases, see the above

^b § 2. And for the time when the right shall be deemed to have first ac-

statute, § 3, &c. *Ante*, 21, &c.

^c 11 Geo. IV. & 1 W. IV. c. 70. § 36.

"spectively, it shall be lawful for the lessor of the plaintiff in any such action, at any time within *ten* days after such tenancy shall expire, or right of entry accrue as aforesaid, to serve a declaration in *ejectment*, entitled of the day next after the day of the demise in such declaration^a, whether the same shall be in term or in vacation, with a notice^b thereunto subscribed, requiring the tenant or tenants in possession to appear and plead thereto within *ten* days, in the court in which such action may be brought; and proceedings shall be had on such declaration, and rules to plead entered and given, in such and the same manner, as nearly as may be, as if such declaration had been duly served before the preceding term: Provided always, that no judgment shall be signed against the casual ejector, until default of appearance and plea within such *ten* days; and that at least *six* clear days' notice of trial shall be given to the defendant, before the commission day of the assizes at which such *ejectment* is intended to be tried: Provided also, that any defendant in such action may, at any time before the trial thereof, apply to a judge of either of his majesty's superior courts at *Westminster*, by *summons*, in the usual manner, for time to plead, or for staying or setting aside the proceedings, or for postponing the trial, until the next assizes; and that it shall be lawful for the judge, in his discretion, to make such order in the said cause, as to him shall seem expedient." And that, "in making up the record of the proceedings on any such declaration in *ejectment*, it shall be lawful to entitle such declaration specially, of the day next after the day of the demise therein, whether such day shall be in term or vacation; and no judgment thereupon shall be avoided or reversed, by reason only of such special title."^c

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Service of declaration, and notice.

Proceedings thereon, and giving rules to plead.

Judgment against casual ejector.

Notice of trial.

Application by defendant, for time to plead, &c.

Record, how made up.

This statute applies only to issuable terms^d: and, under it, when a landlord's right of entry accrued on the day after the

Construction of statute, and decisions thereon.

^a Append. to Chap. XLV. § 1. and see Append. to 1 Sup. to Tidd *Prac.* 9 Ed. Part II. § 26.

^b *Id.* § 27.; and for the form of an affidavit of service of declaration and notice, on this statute, see Append. to Chap. XLV. § 3.

^c Stat. 11 Geo. IV. & 1 W. IV. c.

70. § 37. And for the mode of making up the record on this statute, see Append. to Chap. XLV. § 4. and Append. to 1 Sup. to Tidd *Prac.* 9 Ed. Part II. § 28.

^d *Doe v. Roe*, 2 Crompt. & J. 123. 1 Dowl. Rep. 304. S. C.

CHAP. XLV. *essoins* day of *Trinity* term, it was holden that he was not entitled to serve a declaration in *ejectment* as of that term^a. And the statute does not, it seems, apply to cases where the *ejectment* is brought in *Middlesex*, for the recovery of premises situate in that county; but only where the cause is to be tried at the *assizes*^b. It is no ground, however, for setting aside a verdict for the plaintiff, that he did not give *six* clear days' notice of trial, as required by the statute; the defendant having appeared, and made his defence^c: and it is no defence at *nisi prius*, that the declaration was irregularly served; as where it was served after the term, in a case not within the statute^d.

Title, and commencement of declaration.

The mode of *entitling* declarations, in general, is settled by a late rule of all the courts^e; by which it is ordered, that "every declaration shall be *entitled* in the proper court, and of the day of the month and year on which it is filed or delivered:" but it has been doubted, whether this part of the rule applies to declarations in *ejectment*^f: It is therefore usual to insert the *term*, at the head of the declaration in *ejectment*; though there can be no objection to add thereto, the day of the month and year on which it is served. It was formerly usual for the declaration in *ejectment*, by *original*, to repeat the whole of the *original writ*: But, by a late rule of all the courts^g, "the rules heretofore made, in the courts of King's Bench^h and Common Pleasⁱ respectively, for avoiding long and unnecessary repetitions of the *original writ* in certain actions therein mentioned, shall be extended and applied, in the courts of King's Bench, Common Pleas, and Exchequer of Pleas, to all *personal* and *mixed* actions; and, in none of such actions, shall the *original writ* be repeated in the declaration, but only the nature of the action stated in manner following: viz. '*A. B. was*

Recital of original writ unnecessary.

^a Doe v. Roe, 1 Dowl. Rep. 79. 2 Leg. Obs. 367. S. C.

^b Doe d. Norris v. Roe, 1 Dowl. Rep. 547. 5 Leg. Obs. 431. S. C. per Parke, J.

^c Doe d. Antrobus v. Jepson, 3 Barn. & Ad. 402.

^d Doe d. Rankin v. Brindley, 1 Nev. & M. 1. 4 Barn. & Ad. 84. S. C.

^e R. M. 3 W. IV. reg. 15. 9 Bing.

447. And as to the mode of *entitling* declarations, before stat. 2 W. IV. c. 39, see Tidd Prac. 9 Ed. 428, 6.

^f Doe d. Haines v. Roe, 2 Moore & S. 619. and *vide ante*, 62.

^g R. H. 2 W. IV. reg. 4. 8 Bing. 306.

^h R. M. 1654. § 12. K. B.

ⁱ R. M. 1654. § 16. C. P.

attached to answer *C. D.* in a plea of trespass, or in a plea of trespass and ejectment,'^a or as the case may be; and any further statement shall not be allowed in costs." CHAP. XLV.

The declaration in *ejectment* must formerly have been delivered before the *essoins* day of the term, in which the notice was given to appear; otherwise the plaintiff could not have had judgment till the next term^b: And where the service of the declaration was before the *essoins* day, but the explanation of it to the tenant in possession did not take place till after, the court held that the lessor of the plaintiff was not entitled to judgment^c. But now, by a late rule of all the courts^d, "declarations in *ejectment* may be served before the *first* day of any term; and thereupon the plaintiff shall be entitled to judgment against the casual ejector, in like manner as upon declarations served before the *essoins*, or *first* general return day." Declaration may be served before first day of term.

When the tenant in possession, or his landlord, does not appear, and enter into the consent rule to be made defendant instead of the casual ejector, and to confess lease, entry, and ouster, &c. judgment may be signed against the casual ejector by default, on the expiration of the rule for judgment, and a writ of possession immediately sued out and executed, in term or vacation^e. And, in the Common Pleas, when the plaintiff was *nonsuited* at the assizes, or sittings after term, on account of the tenant or landlord's not appearing at the trial, and confessing lease, entry, and ouster, he was formerly allowed to sign judgment, and take out execution, immediately after the trial^f: But, in the King's Bench, he was not allowed to sign judgment against the casual ejector, until the day in bank, or first day of the ensuing term^g. And, in all the courts, where a *verdict* was given for the plaintiff in vacation, he was obliged to wait till the ensuing term, before he could sign judgment, or take out execution. To remedy this inconvenience, and to make the practice uniform in all the courts, it is enacted by the statute 11 Geo. IV. & 1 W. IV. c. 70.^h, for the more effectual administration of justice in *England* and *Wales*, Judgment and execution, when tenant, or landlord, does not appear.

On nonsuit, for not confessing lease, &c. in C. P.

In K. B.

On verdict for plaintiff.

By stat. 11 Geo. IV. & 1 W. IV. c. 70, § 38.

^a For the form of a declaration in *ejectment* by *original*, since the above rule, see Append. to Chap. XLV. § 1. Ad. 789. 7 Bing. 784. 1 Crompt. & J. 472.

^b *Roe v. Bird v. Doe*, Barnes, 172, 3.

^c *Doe v. Roe*, 1 Dowl. & R. 563.

^d R. T. 1 W. IV. reg. 7. 2 Barn. &

^e Tidd *Prac.* 9 Ed. 1224.

^f *Id.* 1240.

^g *Id.* 1240, 41.

^h § 38.

Judge's certificate, for immediate writ of possession.

that "in all cases of trials of *ejectments* at *nisi prius*, when a *verdict* shall be given for the plaintiff, or the plaintiff shall be *non-suited* for want of the defendant's appearance to confess lease, entry, or ouster, it shall be lawful for the judge before whom the cause shall be tried, to certify^a his opinion, on the back of the record^b, that a writ of possession ought to issue immediately; and upon such certificate, a writ of possession^c may be issued forthwith; and the costs may be taxed, and judgment signed and executed afterwards, at the usual time, as if no such writ had issued: Provided always, that such writ, instead of reciting a recovery by judgment, in the form now in use, shall recite shortly, that the cause came on for trial at *nisi prius*, at such a time and place, and before such a judge, (naming the time, place, and judge,) and that thereupon the said judge certified his opinion that a writ of possession ought to issue immediately."^d

Construction of this statute, and decisions thereon.

The provisions of this act, relating to the issuing of a writ of *habere facias possessionem*, are not affected by the statute 1 W. IV. c. 7.^d And it has been holden, that the judge has no discretion under it, as to the time at which the lessor of the plaintiff shall have possession; but must either grant a certificate to enable him to get immediate possession, or let the case take its regular course^e: and if the judge should think that some time ought to be allowed to the defendant, he will grant a certificate for immediate possession; the lessor of the plaintiff undertaking not to enforce it for a certain time^f. If a lessor of the plaintiff be nonsuited, for want of the defendant's confessing lease, entry, and ouster, the judge will not grant a certificate, under the above statute, to give the lessor of the plaintiff immediate possession, unless an *affidavit*, stating the circumstances of the case, be laid before him^g. And where it was intimated at the trial, by the de-

^a Append. to Chap. XLV. § 5.

^b For the entry of the certificate on record, see *id.* § 7.

^c Append. to 1 Sup. to Tidd *Prac.* 9 Ed. Part II. § 30. And for forms of writs of *feri facias*, and *copias ad satisfaciendum*, for damages and costs, after verdict for the plaintiff in *ejectment*, see *id.* § 31, 2.

^d *Ante*, 178.

^e *Doe d. Williamson v. Dawson*, 4 Car. & P. 589. *per Taunton, J.* *Doe d. Packer v. Hilliard*, 5 Car. & P. 132. *per Park, J.*

^f *Doe d. Packer v. Hilliard*, 5 Car. & P. 132. *per Park, J.*

^g *Per Littledale, J.* 4 Car. & P. 589. and for the form of this *affidavit*, see Append. to Chap. XLV. § 6.

fendant's counsel, that he should move in the next term for a new trial, on the ground of certain evidence having been admitted which was not receivable in point of law, the judge who tried the cause said that, under these circumstances, he should refuse to certify^a.

On suing out the writ of *habere facias possessionem*, a *præcipe* was formerly required in the King's Bench^b, but not in the Common Pleas^c: And now, by a late rule of all the courts^d, a writ of *habere facias possessionem* may be sued out, without lodging a *præcipe* with the officer of the court. This writ was formerly signed, in the King's Bench, by the signer of the writs; and in the Common Pleas, by the prothonotaries: But, by a late rule of all the courts^e, "it shall not be necessary that any writ of execution shall be signed; but no such writ shall be sealed, till the judgment paper, *postea*, or inquisition, has been seen by the proper officer."

Præcipe for *habere facias possessionem* unnecessary.

Writ need not be signed.

In the King's Bench, the practice formerly was, for the plaintiff in error, or his bail, to enter into a recognizance, in *double* the improved rent, or yearly value of the premises, and *single* amount of the costs^f. In the Common Pleas, the clerk of the errors governed himself, in fixing the penalty of the recognizance, by the amount of the rent of the premises, and took the recognizance in *two* years' rent or profits, and double costs^g: and where the plaintiff in error entered into the recognizance, it was not necessary for him, in that court, to give the defendant in error notice thereof^h; nor could he be examined, in the King's Bench, as to his sufficiencyⁱ: though, when bail in error was put in, notice thereof must have been given, and they might have been examined, as in other cases. In the Exchequer, the bail must formerly have justified in *double* the improved annual rent, or value

Recognizance of bail in error, in what sum.

^a Doe d. Cook v. Barrett, 1 Leg. Obs. 351. per Garrow, B.

^b Imp. K. B. 10 Ed. 596.

^c 2 Sel. Pr. 2 Ed. 100. 121. Imp. C. P. 7 Ed. 631.

^d R. H. 2 W. IV. reg. 1. § 76. 8 Bing. 299.

^e R. H. 2 W. IV. reg. 1. § 75. 8 Bing. 299.

^f Keene d. Ld. Byron v. Deardon, 8

East, 296. and see Doe v. Roache, Cas. temp. Hardw. 374.

^g Doe d. Webb v. Goundry, 7 Taunt. 428. 1 Moore, 119, 20. S. C. and see Doe d. Fenwick v. Pearson, Barnes, 103. accord.

^h Doe d. Webb v. Goundry, 7 Taunt. 427. 1 Moore, 118. S. C.

ⁱ Keene d. Ld. Byron v. Deardon, 8 East, 299.

CHAP. XLV. of the premises recovered ^a: But, by a late rule of all the courts ^b,
 “ in *ejectment*, the recognizance of bail in error shall be taken in
 “ double the yearly value, and double the costs.”

^a R. E. 33 Geo. II. in *Scac. Man.*
 Ex. Append. 217.

^b R. H. 2 W. IV. *reg.* 1. § 27. 8
 Bing. 291.

CHAP. XLVI.

Of the PROCEEDINGS in PROHIBITION; and on WRITS of MANDAMUS.

How treated of. IN the present chapter, it is intended to treat of the proceedings
 in *prohibition*, and on writs of *mandamus*, as they existed before,
 and are affected by the statute 1 W. IV. c. 21. A *prohibition* is
 Prohibition, defined to be a writ issuing properly only out of the court of
 what. King's Bench, being the king's prerogative writ; but, for the fur-
 therance of justice, it may now also be had, in some cases, out of
 the court of Chancery ^a, Common Pleas ^b, or Exchequer ^c; di-
 rected to a judge, and parties of a suit, in any inferior court, com-
 manding them to cease from the prosecution thereof, upon a sug-
 gestion, that either the cause originally, or some collateral matter
 arising therein, does not belong to that jurisdiction, but to the cog-
 nizance of some other court ^d.

Proceedings in, The mode of proceeding on this writ, previously to the statute
 previously to 1 W. IV. c. 21. was as follows: The party aggrieved in the court
 stat. 1 W. IV. below, applied to the superior court, setting forth, in a *suggestion*
 c. 21. upon record, the nature and cause of his complaint, in being drawn
ad aliud examen, by a jurisdiction or manner of process disallowed

^a Anon. 1 P. Wms. 476.

^b Hutton's case, Hob. 15.

^c Llen v. Seymore, Palm. 525.

^d 3 Chlt. Blac. Com. 112. and see
 F. N. B. 39.

by the laws of the kingdom; upon which, if the matter alleged appeared to the court to be sufficient, the writ of prohibition immediately issued; commanding the judge not to hold, and the party not to prosecute, the plea. But sometimes the point might be too nice and doubtful to be decided merely upon a motion: and then, for the more solemn determination of a question, the party applying for the writ was directed by the court to *declare* in prohibition; that is, to prosecute an action, by filing a declaration against the other, upon a supposition or fiction, which was not traversable^a, that he had proceeded in the suit below, notwithstanding the writ of prohibition: and if, upon demurrer and argument, the court were finally of opinion, that the matter suggested was a good and sufficient ground of prohibition in point of law, then judgment, with nominal damages, was given for the party complaining, and the defendant, and also the inferior court, were prohibited from proceeding any further. On the other hand, if the superior thought it no competent ground for restraining the inferior jurisdiction, then judgment was given against him who applied for the prohibition in the court above, and a writ of *consultation* was awarded, so called, because, upon deliberation and consultation had, the judges found the prohibition to be ill founded, and therefore, by that writ, they returned the cause to its original jurisdiction, to be there determined, in the inferior court^b. And, even in ordinary cases, the writ of prohibition was not absolutely final and conclusive: for though the ground were a proper one in point of *law*, for granting the prohibition, yet if the *fact* that gave rise to it were afterwards falsified, the cause was remanded to the prior jurisdiction. If, for instance, a custom were pleaded in the spiritual court, a prohibition was granted, because that court had no authority to try it: but, if the fact of such a custom were brought to a competent trial, and there found false, a writ of consultation would have been granted. For this purpose, the party prohibited might have appeared to the prohibition, and taken a declaration, (which must always have pursued the sug-

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^a *Statford v. Neale*, 1 Str. 482. See *v. Wolfenden*, Barnes, 148.

^b 3 Chit. Blac. Com. 113, 14. and see *Parish of Aston v. Castle Birmidge*

Chapel, Hob. 67. Com. Dig. tit. *Pleader*, H. 2 Cromp. 2 Ed. 270, &c. 3 Sel. Pr. 1 Ed. 424, &c. Lee Pr. Dict. tit. *Prohibition*.

CH. XLVI. gestion,) and so pleaded to issue upon it; denying the contempt, and traversing the custom upon which the prohibition was grounded; and if that issue were found for the defendant, he then had a writ of consultation^a.

Filing suggestion, and proceedings thereon.

Hence it appears, that when a *prohibition* was moved for, the method was, for the party to file a *suggestion* in court, stating the proceedings which had been had in the court below, and then suggesting the reason why he prayed the prohibition; and upon this the court granted a rule to shew cause, why a prohibition should not issue; and if, upon shewing cause, it appeared to the court, that the surmise was not true, or not clearly sufficient to ground the prohibition upon, they would deny it; otherwise they would make the rule absolute for a prohibition, or, if the matter were doubtful, they would order the party to declare^b.

When grantable or not, after sentence.

It is clearly agreed, that in all cases where it appeared, upon the face of the proceedings, that the inferior court had not jurisdiction, a prohibition might have been awarded, and was grantable as well after as before sentence; for the king's superior court had a superintendency over all inferior jurisdictions, and were to take care that they kept within their due bounds^c: but where the court had a natural jurisdiction of the thing, but was restrained by some statute, as by the 23 Hen. VIII. c. 9. for not citing out of the diocese, there the party must have come before sentence; for after pleading, and admitting the jurisdiction of the court below, it would have been hard and inconvenient to grant a prohibition.

Motion for.

On moving for a *prohibition*, the court seldom awarded it in the first instance^d; but generally granted a rule *nisi*, or that the adverse party might shew cause why it should not be granted: and, upon shewing cause, the court might have discharged the rule, without putting the parties to join issue or demur^e. Where the matter suggested for a prohibition appeared upon the face of the proceedings, the court would not formerly have insisted upon an *affidavit* of the truth of the suggestion^f; though an *affidavit* must have been filed, that the copy of the proceedings stated in

Affidavit of truth of suggestion, when formerly necessary, and when not.

^a 3 Chit. Blac. Com. 114.

Buggin v. Bennett, 4 Bur. 2037. 2

^b Parish of Aston v. Castle Birmidge Chapel, Hob. 67.

Cromp. Pr. 2 Ed. 272.

^d Cromp. Pr. 285.

^c Bac. Abr. tit. *Prohibition*, H. and see Com. Dig. tit. *Prohibition*, H. 1.

^e Webb v. Dyer, 1 Sid. 163.

^f Godfrey v. Llewellyn, 2 Salk. 549.

the suggestion was a true copy^a: But where the prohibition was moved for upon any ground not appearing on the face of the proceedings, it must either have been pleaded below, or verified by *affidavit*^b. And, on moving for a prohibition to the spiritual court, for refusing a plea, there must have been an *affidavit* of the truth of the facts contained in the plea; for otherwise any one might have come, and suggested a false fact, and so ousted the spiritual court of their jurisdiction^c. A prohibition was not grantable on the *last* day of term; but a rule might have been obtained on motion, to stay proceedings till the ensuing term^d: And when the court inclined to grant the motion for a prohibition, the defendant had a sort of right to insist that the plaintiff should declare; but where the court inclined against the motion, the plaintiff had no such right to insist upon declaring: for since the defendant was liable to costs, he could not be compelled to defend the suit^e; wherefore, in such a case, there might have been judgment by default, and the court been obliged to prohibit, even against their own opinion; and there could be no injury to the plaintiff by discharging the rule, as he might apply to another court^f. And where the party was ordered to declare in prohibition, it was not necessary for him to take out the writ; but serving the other side with the rule was deemed sufficient^g.

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Not grantable on last day of term.
When plaintiff must declare, or not.

The *declaration* in prohibition was founded upon an attachment for a contempt, and therefore, it was a *qui tam* declaration; for it supposed a contempt to the king, in proceeding after the writ delivered^h: but the contempt was but form, and the jury need not have given any verdict about itⁱ. To a declaration in prohibition, the defendant might have pleaded, or demurred; and as the defendant therein was considered as an actor, the *issue* might have been made up and entered by him, as well as the plain-

Declaration.

Plea or demurrer.
Issue and trial.

^a *Eaglesfield v. Anderson*, Barnes, 427.

^b *Id. ib.* and see *Anon.* 2 Salk. 551.
Buggin v. Bennett, 4 Bur. 2039, 40.

^c *Burdett v. Newell*, 2 Ld. Raym. 1211.

^d *Anon. Latch*, 7. 2 Crompt. Pr. 2 Ed. 264.

^e *Gegge v. Jones*, 2 Str. 1149.

^f *Rex v. Bishop of Ely*, 1 Blac. Rep. 81.

^g 2 Crompt. 2 Ed. 286.

^h *Langdale's case*, 12 Co. 61. and see *Ede v. Jackson*, Fort. 845. Com. Dig. tit. *Prohibition*, C.

ⁱ *Statford v. Neale*, 1 Str. 482. See *v. Wolfenden*, Barnes, 148. and see 2 Rep. C. L. Com. 12

CH. XLVI. tiff^a; and, for a similar reason, he might have made up the *record*, and proceeded to trial, without any laches or default in the plaintiff, or applying to the court for a trial by *proviso* ^b.

Judgment.

Damages.

The judgment for the plaintiff was, *quod stet prohibitio*; and for the defendant, *quod eat consultatio*: And where an issue was joined on a declaration in prohibition, if the jury found a verdict for the plaintiff, yet they gave no more than one shilling damages, for it was in the nature of an issue to inform the conscience of the court^c: But after the plaintiff had judgment *quod stet prohibitio*, he might have brought his action upon the case, and recovered the damages he had sustained ^d. No costs were recoverable in *prohibition*, at common law^e: But, by the statute 8 & 9 W. III. c. 11, § 3, it is enacted, that "in all suits upon prohibitions, the plaintiff obtaining judgment, or any award of execution, after plea pleaded, or demurrer joined therein, shall likewise recover his costs of suit; and if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs, and have execution for the same by *capias ad satisfaciendum, fieri facias, or elegit*;" with a *proviso* ^f, that "nothing therein contained shall be construed to alter the laws in being as to executors or administrators, in such cases where they were not then liable to the payment of costs of suit." Upon this statute, it has been holden, that the plaintiff succeeding after plea pleaded, or demurrer joined, ought to have his costs from the time of the suggestion, or first motion for a prohibition, and all costs incident and subsequent thereto^g.

Proceedings in,
how affected by
stat. 1 W. IV.
c. 21.

Having thus stated the proceedings in *prohibition*, as they existed before the statute 1 W. IV. c. 21. and which, so far as they are not varied or altered thereby, are still in force, it remains to be shewn, in what manner they are affected by the provisions of that act. By this statute, reciting that whereas the filing a *sug-*

^a Tidd *Prac.* 9 Ed. 734.

^b *Id.* 760.

^c Carter v. Leeds, M. 2 Geo. II.

^d 2 Cromp. 2 Ed. 287.

^e Anon. Comb. 20. Free v. Burgoyne, 6 Barn. & C. 538. 9 Dowl. & R. 601. S. C.

^f § 5. and see Bellew v. Aylmer, 1

Str. 188. Scammell v. Wilkinson, 3 East, 202.

^g Wills v. Turner, Cas. Pr. C. P. 11.

1 Str. 82. S. C. Haughton v. Starkie,

2 Str. 1062. And see further, as to costs in *prohibition*, and decisions on stat. 8 & 9 W. III. c. 11, Tidd *Prac.*

9 Ed. 948, 9.

gestion of record, on application for a writ of prohibition, is productive of unnecessary expence; and the allegation of contempt in a *declaration* in prohibition, filed before writ issued, is an unnecessary form; and it is expedient to make some better provision for payment of *costs*, in cases of prohibition; it is enacted, that "it shall not be necessary to file a *suggestion*, on any application for a writ of prohibition; but such application may be made on *affidavits* only: and in case the party applying shall be directed to declare in prohibition before writ issued, such declaration shall be expressed to be on behalf of such party only, and not, as heretofore, on the behalf of the party and of his majesty; and shall contain and set forth, in a concise manner, so much only of the proceeding in the court below, as may be necessary to shew the ground of the application, without alleging the delivery of a writ, or any contempt; and shall conclude, by praying that a writ of prohibition may issue: to which declaration the party defendant may demur, or plead such matters, by way of traverse or otherwise, as may be proper to shew that a writ ought not to issue, and conclude by praying that such writ may not issue; and judgment shall be given, that the writ of prohibition do or do not issue, as justice may require: And the party in whose favour judgment shall be given, whether on nonsuit, verdict, demurrer, or otherwise, shall be entitled to the costs attending the application, and subsequent proceedings, and have judgment to recover the same; and in case a verdict shall be given for the party plaintiff in such declaration, it shall be lawful for the jury to assess damages, for which judgment shall also be given; but such assessment shall not be necessary, to entitle the plaintiff to costs." On this statute, it has been holden, that where a rule is made absolute for issuing a prohibition before plea, the costs of the rule cannot be granted to the successful party; the statute only applying to cases where there have been pleadings in prohibition^a.

On a *prohibition* being granted to the ecclesiastical court, in a suit for tithes, it was enacted by the statute 2 & 3 Edw. VI. c. 13.^b that "in case the suggestion were not proved true by *two* honest and sufficient witnesses at the least, in the court where

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Not necessary to file suggestion, on applying for writ of prohibition, which may be made on affidavits only.

Contents of declaration, when party is directed to declare in.

Defendant may demur, or plead to declaration.

Judgment.

Costs.

Damages.

Provisions of stat. 2 & 3 Edw. VI. c. 13, on prohibition to ecclesiastical court, in suit for tithes.

^a Rex v. Kealing, 1 Dowl. Rep. 440. and see Tidd Prac. 9 Ed. 948.

^b 4 Leg. Obs. 253. S. C. per Patterson, J. § 14.

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 "so granted and awarded, then the party who was hindered of his
 "suit in the ecclesiastical court by such prohibition, should, upon
 "his request and suit, without delay, have a consultation granted in
 "the same case, in the court where the prohibition was granted;
 "and should also recover double costs and damages, against the
 "party that pursued the prohibition, to be assigned or assessed
 "by the court where the consultation was granted."

Construction of
 2 & 3 Edw. VI.
 c. 13.

The provision of the above act, which requires that a *suggestion* for a prohibition, in a suit for tithes, should be proved before a judge, within *six* months, by two witnesses, received a very lax construction: Persons, whose testimony could not be admitted at the trial, were deemed competent for this purpose; testimony founded upon hearsay was deemed sufficient; and proof of one part of the suggestion by one witness, and of another part by another witness, was considered as proof by two witnesses, within the meaning of the statute^a. And as all the facts necessary to entitle the plaintiff to his writ, will in future be verified by the *affidavits* made in support of the motion in the first instance, it was enacted by the statute 1 W. IV. c. 21, § 2, that "so much of the act "passed in the second and third years of the reign of King *Edward* "the Sixth, intituled '*An act for payment of tithes*,' as relates to "prohibition, shall be, and the same is thereby repealed."

So much thereof
 as relates to
 prohibition, re-
 pealed.

Mandamus,
 writ of, what,
 and how en-
 forced at com-
 mon law.

Proceedings on,
 by stat. 9 Ann.
 c. 20.

The writ of *mandamus*, which is the proper remedy for compelling obedience to acts of parliament and the king's charters, and for preventing disorders from failure of justice, could in former times only be enforced, if the return were good in law, by an action on the case for a false return^b. This proceeding, amongst others, being found, in the case of *corporate* offices, very dilatory and expensive, whereby great mischiefs had ensued, and more were likely to ensue, if not timely prevented^c, an act of parliament was passed in the reign of Queen *Anne*^d, for rendering the proceedings upon writs of *mandamus* more speedy and effectual, and for the more easy trying and determining the rights of offices

^a 2 Rep. C. L. Com. 12. And for decisions on this statute, see *Tidd Prac.* 9 Ed. 948.

^b 2 Rep. C. L. Com. 11.

^c See preamble to stat. 9 Ann. c. 20.

^d Stat. 9 Ann. c. 20.

CH. XLVI.

and franchises in corporations and boroughs; whereby, after reciting that whereas divers persons had illegally intruded themselves into, and had taken upon themselves to execute the offices of mayors, bailiffs, portreeves, and other officers, within cities, towns corporate, boroughs and places, within that part of *Great Britain* called *England* and *Wales*; and where such offices were annual offices, it had been found very difficult, if not impracticable, by the laws then in being, to bring to a trial and determination the right of such persons to the said offices, within the compass of the year; and where such offices were not annual offices, it had been found difficult to try and determine the right of such persons to such offices, before they had done divers acts in the said offices, prejudicial to the peace, order and good government within such cities, &c., wherein they had respectively acted; and that divers persons, who had a right to such offices, or to be burgesses or freemen of such cities, &c. had either been illegally turned out of the same, or had been refused to be admitted thereto, having in many of the said cases no other remedy to procure themselves to be respectively admitted or restored to their said offices or franchises of being burgesses or freemen, than by writs of *mandamus*; it was enacted, that “where any writ of *mandamus* shall issue out of the court of Queen’s Bench, &c. in any of the cases aforesaid, such person or persons, who by the laws of this realm are required to make a return to such writ of *mandamus*, shall make his or their return to the first writ of *mandamus*.”^a

Return to be made to first writ.

And it is thereby further enacted, that “as often as, in any of the cases aforesaid, any writ of *mandamus* shall issue out of any of the said courts, and a return shall be made thereunto, it shall and may be lawful to and for the person or persons suing or prosecuting such writ of *mandamus*, to plead to, or traverse all or any the material facts contained within the said return; to which the person or persons making such return shall reply, take issue, or demur; and such further proceedings, and in such manner, shall be had therein, for the determination thereof, as might have been had, if the person or persons suing such writ had brought his or their action on the case for a false return: And if any issue shall be joined on such proceedings, the person or persons suing such writ shall and may try the same, in such

Prosecutor may plead, &c., and party making return reply, &c.

Further proceedings therein to trial, judgment, and execution, for prosecutor.

^a Stat. 9 Ann. c. 20. § 1.

Damages and costs.	<p>“ place as an issue joined in such action on the case should or</p> <p>“ might have been tried ; and in case a verdict shall be found for</p> <p>“ the person or persons suing such writ, or judgment given for</p> <p>“ him or them upon a demurrer, or by <i>nil dicit</i>, or for want of replication, or other pleading, he or they shall recover his or their</p> <p>“ damages and costs^a, in such manner as he or they might have</p> <p>“ done in such action on the case as aforesaid ; such costs and</p> <p>“ damages to be levied by <i>capias ad satisfaciendum, fieri facias</i>, or</p>
Peremptory writ.	<p>“ <i>elegit</i> ; and a peremptory writ of <i>mandamus</i> shall be granted</p> <p>“ without delay, for him or them for whom judgment shall be given,</p> <p>“ as might have been if such return had been adjudged insufficient :</p>
Judgment for party making return.	<p>“ And in case judgment shall be given for the person or persons</p> <p>“ making such return to such writ, he or they shall recover his or</p> <p>“ their costs of suit, to be levied in manner aforesaid.”^b</p>
Persons against whom damages shall be recovered, not liable to be sued in other actions.	<p>“ Provided always, that if any damages shall be recovered, by</p> <p>“ virtue of this act, against any such person or persons making such</p> <p>“ return to such writ as aforesaid, he or they shall not be liable to</p> <p>“ be sued in any other action or suit for the making such return.”^c</p>
Court may allow convenient time to return <i>mandamus</i> , or to plead, or reply, &c.	<p>And it is thereby further enacted and declared, that “ it shall</p> <p>“ and may be lawful to and for the said courts respectively, to</p> <p>“ allow to such person or persons respectively, to whom any writ</p> <p>“ of <i>mandamus</i> shall be directed, or to the person or persons who</p> <p>“ shall sue or prosecute the same, such convenient time respectively,</p> <p>“ ly, to make a return, plead, reply, rejoin, or demur, as to the</p> <p>“ said courts respectively shall seem just and reasonable.”^d And</p> <p>that “ an act made in the fourth year of her majesty’s reign, intituled</p> <p>“ An act for the amendment of the law, and the better advancement</p> <p>“ of justice^e, and all the statutes of jeofails, shall be extended to all</p> <p>“ writs of <i>mandamus</i>, and proceedings thereon, for any the matters</p> <p>“ in this act mentioned.”^f On the foregoing statute it has been</p> <p>determined, that the prosecutor of a <i>mandamus</i>, to which a return</p> <p>has been made, having moved for a <i>concilium</i>, and the court having,</p> <p>upon argument, adjudged that the return is sufficient in point of</p>
Statutes of jeofails extended to writs of <i>mandamus</i> , &c.	

^a As a plaintiff, at common law, might have recovered damages in an action upon the case for a false return to a *mandamus*, he is now entitled to costs, when he succeeds in such action, by the statute of *Gloucester*; and when he fails therein, the defendant has a right to costs, under the 4 *Jac. I. c. 3. Hul. Costs, 2 Ed.*

823.; and see *Imp. Mandamus*, 160. *Tidd Prac. 9 Ed. 949.*

^b Stat. 9 Ann. c. 20. § 2.

^c *Id.* § 3.

^d *Id.* § 6.

^e Stat. 4 Ann. c. 16.

^f Stat. 9 Ann. c. 20. § 2.

law, cannot afterwards traverse the facts contained in the return^a: CH. XLVI. and it has been made a question, whether, after an issue in fact found in favour of the party making the return, the prosecutor can question its legality^b.

The provisions contained in the statute 9 Ann. c. 20. relating to the writs of *mandamus* therein mentioned, having been found useful and convenient, the same were extended to the proceeding on other such writs, by the statute 1 W. IV. c. 21. § 3.; by which it is enacted, that “the several enactments contained in the said statute, relating to the return to writs of *mandamus*, and the proceedings on such returns, and to the recovery of damages and costs, shall be, and the same are thereby extended, and made applicable to all other writs of *mandamus*, and the proceedings thereon, except so far only as the same may be varied or altered by that act.”

Provisions of stat. 9 Ann. c. 20. extended to all other writs of *mandamus*, by stat. 1 W. IV. c. 21. § 3.

And, by another clause of the same statute^b, reciting that whereas writs of *mandamus*, other than such as relate to the offices and franchises mentioned in or provided for by the said act made in the ninth year of the reign of Queen Anne^c, are sometimes issued to officers and other persons, commanding them to admit to offices, or do or perform other matters, in respect whereof the persons to whom such writs are directed claim no right or interest, or whose functions are merely ministerial, in relation to such offices or matters; and it may be proper that such officers and persons should, in certain cases, be protected against the payment of damages or costs, to which they may otherwise become liable; it is enacted, that “it shall be lawful for the court to which application may be made for any writ of *mandamus*, (other than such as relate to the said offices and franchises mentioned in or provided by the said act made in the reign of Queen Anne,) if such court shall see fit so to do, to make rules and orders, calling, not only upon the person to whom such writ may be required to issue, but also all and every other person having or claiming any right or interest in or to the matter of such writ, to shew cause against the issuing of such writ, and payment of costs of the application; and upon the appearance of such other person, in compliance with such rules, or in default of appearance after service thereof, to exercise all such powers and authorities, and make all such

For protection of officers, &c. not interested, or merely ministerial.

Rules and orders to be made on persons interested, to shew cause.

^a *Rex v. Mayor, &c. of London*, 3 Barn. & Ad. 255. 275.

^b Stat. 1 W. IV. c. 21. § 4.

^c Stat. 9 Ann. c. 20. *Ante*, 206.

CH. XLVI. "rules and orders applicable to the case, as are or may be given
 "or mentioned by or in any act passed or to be passed during
 "this present session of parliament, for giving relief against
 "adverse claims, made upon persons having no interest in the
 "subject of such claims^a. Provided always, that the return to be
 "made to any such writ, and issues joined, in fact or in law, upon
 "any traverse thereof, or upon any demurrer, shall be made and
 "joined by and in the name of the person to whom such writ
 "shall be directed; but nevertheless the same shall and may, if
 "the court shall think fit so to direct, be expressed to be made
 "and joined on the behalf of such other person as may be men-
 "tioned in such rules; and in that case, such other person shall
 "be permitted to frame the return, and to conduct the subsequent
 "proceedings, at his own expence; and in such case, if any
 "judgment shall be given for or against the party suing such writ,
 "such judgment shall be given against or for the person or persons
 "on whose behalf the return shall be expressed to be made, and
 "who shall have the like remedy for the recovery of costs, and
 "enforcing the judgment, as the person to whom the writ shall
 "have been directed, might and would otherwise have had."

Return to writ,
and issues, by
whom, and how
to be made and
joined.

Judgment, for or
against whom to
be given.

Remedy thereon.

Proceedings not
to abate by
death, resigna-
tion, or removal
of officer, &c.

And "in case the return to any such writ shall, in pursuance of
 "the authority given by that act, be expressed to be made on
 "behalf of any other person as aforesaid, the further proceedings
 "on such writ shall not abate or be discontinued, by the death or
 "resignation, or removal from office, of the person having made
 "such return; but the same shall and may be continued and
 "carried on in the name of such person; and if a *peremptory* writ
 "shall be awarded, the same shall and may be directed to any
 "successor in office, or right, to such person."^b

Costs on appli-
cation for *man-*
damus, and of

On moving for a writ of *mandamus*, a rule is either granted or
 refused in the first instance; and, if a rule to shew cause be

^a The act here intended to be referred to, is the 1 & 2 W. IV. c. 58, to enable courts of law to give relief against adverse claims, made upon persons having no interest in the subject of such claims: But this act not having passed during the then present session of parliament, a clause was inserted therein, (§ 8.) that "upon any such application as is in the

"said act of 1 W. IV. c. 21. and there-
 "in before mentioned, it shall be lawful
 "for the court to exercise all such powers
 "and authorities, and make all such rules
 "and orders, applicable to the case, as
 "are given or mentioned by or in the
 "said act of 1 & 2 W. IV. c. 58."

^b Stat. 1 W. IV. c. 21. § 5.

granted, it is either made absolute or discharged: In the latter case, the court will discharge it, with or without costs, according to circumstances^a. But no general provision was made for the costs of the writ, if the same was issued and obeyed: To remedy which, and for making some further provision for the payment of costs on applications for *mandamus*, it is enacted by the statute 1 W. IV. c. 21^b, that "in all cases of application for any writ of *mandamus* whatsoever, the costs of such application, whether the writ shall be granted or refused, and also the costs of the writ, if the same shall be issued and obeyed, shall be in the discretion of the court; and the court is thereby authorized to order and direct by whom, and to whom, the same shall be paid. This provision, however, did not apply to cases, where the application for a *mandamus* had been made before the act came in force."^c

writ, if issued and obeyed, to be in discretion of court.

^a *Rex v. Bankes*, 3 Bur. 1453. *Rex v. Bishop of Chester*, 1 Durnf. & E. 396. and see Hul. Costs, 1 Ed. 331. Tidd *Prac.* 9 Ed. 949.

^b § 6.

^c *Rex v. Inhabitants of Wix*, 2 Barn. & Ad. 197. and see *Rex v. Hungerford Market Company*, *id.* 204. (a.)

APPENDIX.

PART I.

ACT

For the more speedy Judgment and Execution in Actions brought in His Majesty's Courts of Law at Westminster, and in the Court of Common Pleas of the County Palatine of Lancaster ; and for amending the Law as to Judgment on a Cognovit actionem, in Cases of Bankruptcy.

(1 W. IV. c. 7.)

[11TH MARCH, 1831.]

WHEREAS the judgment and execution, in actions brought in his majesty's courts of law at *Westminster*, are often delayed, by reason of the interval between the terms: Now, for the prevention of such delay, be it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that any writ of inquiry of damages, to be issued in or by either of the said courts, by whatever form of process the action may have been commenced, may be made returnable, and be returned, on any day certain, in term or vacation, to be named in such writ, and such writ shall be as valid and effectual, as if the same had been returnable according to the course of the common law ; and thereupon, at the return thereof, a rule for judgment may be given, costs taxed, final judgment signed, and execution issued forthwith, unless the sheriff, or other officer before whom the same may be executed, shall certify, under his hand, upon such writ, that judgment ought not to be signed, until the defendant shall have had an opportunity to apply to the court, to set aside the execution of such writ, or one of the judges of the said courts shall think fit to order the judgment to be stayed,

Preamble.

Writs of inquiry may be made returnable on any day to be named therein.

Ante, 131, 2.

Proceedings to be had at the return thereof.

Ante, 132.

until a day to be named in such order: Provided always, that in case the signing of judgment on such writ shall be postponed, by reason of such certificate or order, or by the choice of the plaintiff, or otherwise, and judgment shall be afterwards signed thereon, such judgment shall be entered of record, as of the day of the return of such writ, unless the court shall otherwise direct.

The judge before whom any action shall be tried may certify, before the end of the sittings or assizes, that execution ought to issue forthwith.

Ante, 175.

In which case judgment may be signed, and execution issued, according to the terms of the certificate.

Ante, 175, 6.

Entering and recording of judgment.

Ante, 132, 177.

Teste of execution.

Ante, 183.

Judgment may be vacated, execution stayed, and new trial granted.

Ante, 132, 177, 8.

II. And be it further enacted, that in all actions brought in either of the said courts, by whatever form of process the same may be commenced, it shall be lawful for the judge before whom any issue joined in such action shall be to be tried, in case the plaintiff or demandant therein shall become nonsuit, or a verdict shall be given for the plaintiff or demandant, defendant or tenant, to certify, under his hand, on the back of the record, at any time before the end of the sittings or assizes, that in his opinion execution ought to issue in such action forthwith, or at some day to be named in such certificate, and subject, or not, to any condition or qualification, and in case of a verdict for the plaintiff, then either for the whole or for any part of the sum found by such verdict; in all which cases, a rule for judgment may be given, costs taxed, and judgment signed forthwith, and execution may be issued forthwith, or afterwards, according to the terms of such certificate, on any day in vacation or term; and the *postea*, with such certificate as a part thereof, shall and may be entered of record, as of the day on which the judgment shall be signed, although the writ of *distringas juratores*, or *habeas corpora juratorum*, may not be returnable until after such day: Provided always, that it shall be lawful for the party entitled to such judgment, to postpone the signing thereof.

III. And be it further enacted, that every judgment to be signed by virtue of this act, may be entered and recorded as the judgment of the court wherein the action shall be depending, although the court may not be sitting on the day of the signing thereof; and every execution issued by virtue of this act, shall and may bear *teste* on the day of issuing thereof; and such judgment and execution shall be as valid and effectual, as if the same had been signed and recorded, and issued, according to the course of the common law.

IV. Provided always, that notwithstanding any judgment signed or recorded, or execution issued, by virtue of this act, it shall be lawful for the court in which the action shall have been brought, to order such judgment to be vacated, and execution to be stayed or

set aside, and to enter an arrest of judgment, or grant a new trial, or new writ of inquiry, as justice may appear to require; and thereupon the party affected by such writ of execution, shall be restored to all that he may have lost thereby, in such manner as upon the reversal of a judgment by writ of error, or otherwise, as the court may think fit to direct.

V. Provided always, and be it further enacted, that nothing in this act contained shall be deemed to frustrate or make void any provision relating to the issuing of any writ of *habere facias possessionem*, contained in the act passed in the first year of the reign of his present majesty, intituled '*An act for the more effectual administration of justice in England and Wales.*'

Not to affect provision in 1. W. IV. c. 70. relating to writs of possession. *Ante*, 178.

VI. Provided always, and be it further enacted, that no officer of either of the said courts shall, for the purpose of taxing costs, on any judgment to be signed by virtue of this act, be compelled to attend at any time between the last day of *August*, and the twenty-first day of *October*, in any year.

Limitation as to taxing costs. *Ante*, 178.

VII. And whereas by an act passed in the sixth year of the reign of his late majesty King *George* the Fourth, intituled '*An act to amend the laws relating to bankrupts,*' it is provided, that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution, to the prejudice of other fair creditors, but shall be paid rateable with such creditors: And whereas, by reason of such provision, plaintiffs have been and may be deterred from accepting a *cognovit actionem*, with stay of execution, whereby the expence of further proceedings in such action might have been and may be saved or diminished; for remedy thereof be it enacted, that no judgment signed, or execution issued, after the passing of this act, on a *cognovit actionem* signed after declaration filed or delivered, or judgment by default, confession, or *nihil dicit*, according to the practice of the court, in any action commenced adversely, and not by collusion for the purpose of fraudulent preference, shall be deemed or taken to be within the said provision of the said recited act.

No judgment signed, or execution issued, on a *cognovit* signed after declaration filed, shall be deemed within the provision of 6 Geo. IV. c. 16. *Ante*, 187.

VIII. And whereas by an act passed in the twenty-second year of the reign of his late majesty King *George* the Second, made and passed, among other purposes, for the more frequent return of writs in the counties palatine of *Chester* and *Lancaster*, writs of *capias ad respondendum* may be made returnable in the court of Common Pleas of the said county palatine of *Lancaster*, on the first

In lieu of the return days in Easter and Michaelmas terms, all writs of inquiry of damages, &c. to be returnable on the first Wednesday

in every month,
in addition to
the first and last
days of each as-
sises.

Ante, 138.

Wednesday in every month: And whereas by another act passed at a sessions of parliament holden in the thirty-ninth and fortieth years of the reign of his late majesty King *George* the Third, intituled '*An act for the better regulating the practice, and for preventing delays in the proceedings of the court of Common Pleas at Lancaster,*' writs of inquiry of damages, and certain other writs in the said act in that behalf mentioned, issued by and out of the same court, may be made returnable on any of the return days in *Easter* and *Michaelmas* terms respectively, according to the course of his majesty's court of Common Pleas at *Westminster*, in addition to the first and last days of each assises held for the said county; and it is expedient to quicken the proceedings in the said court of the said county; be it therefore enacted, that in lieu of the return days in *Easter* and *Michaelmas* terms, all writs of inquiry of damages, and other writs in the said last-mentioned act in that behalf mentioned, shall and may be made returnable in the said court of the said county, on the first *Wednesday* in every month, in addition to the first and last days of each assises held for the said county; and such proceedings shall and may be had, on the return thereof, as upon such writs returnable according to the law in force at and before the passing of this act.

When writs, for
removing suits
from inferior
courts, shall be
returnable.

Ante, 118.

IX. And whereas persons suing in the inferior courts of the said county palatine of *Lancaster*, are often vexatiously delayed in the recovery of their just demands, by the removal of their suits into the said court of Common Pleas, by reason that the writs, whereby the same are removed, can be made returnable only at the assises holden for the said county; for remedy thereof be it enacted, that all writs of *pone loquelam*, *recordari facias loquelam*, *accedas ad curiam*, and all other writs now lawfully issued out of the Chancery of the said county palatine of *Lancaster*, for the removal of causes from the inferior courts of the said county, into the said court of Common Pleas, which shall be issued after the expiration of fourteen clear days next after the passing of this act, shall be made returnable on the first *Wednesday* in the month next after the issuing thereof, unless in the meantime the assises shall be holden for the said county, and if the assises shall be so holden in the meantime, then on the first or last day of such assises, as the case may be, next after the issuing thereof; and that all such writs, made returnable at any other time than according to the provision herein-before contained, shall be utterly null and void to all intents and purposes.

ACT

To enable Courts of Law to give Relief against adverse Claims, made upon Persons having no Interest in the Subject of such Claims.

(1 & 2 W. IV. c. 58.)

[20TH OCTOBER, 1831.]

WHEREAS it often happens, that a person sued at law for the recovery of money or goods wherein he has no interest, and which are also claimed of him by some third party, has no means of relieving himself from such adverse claims, but by a suit in equity, against the plaintiff and such third party, usually called a bill of *interpleader*, which is attended with expence and delay; for remedy thereof, be it enacted, by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that upon application made by or on the behalf of any defendant, sued in any of his majesty's courts of law at *Westminster*, or in the court of Common Pleas of the county palatine of *Lancaster*, or the court of pleas of the county palatine of *Durham*, in any action of *assumpsit*, *debt*, *detinue*, or *trover*, such application being made after declaration and before plea, by *affidavit* or otherwise, showing that such defendant does not claim any interest in the subject matter of the suit, but that the right thereto is claimed or supposed to belong to some third party, who has sued or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into court, or to pay or dispose of, the subject matter of the action, in such manner as the court (or any judge thereof) may order or direct, it shall be lawful for the court, or any judge thereof, to make rules and orders, calling upon such third party to appear, and to state the nature and particulars of his claim, and maintain or relinquish his claim; and upon such rule or order, to hear the allegations, as well of such third party as of the plaintiff, and in the meantime, to stay the proceedings in such action, and finally to order such third party to make himself defendant in the same, or some other action, or to proceed to trial on one or more assigned issue or issues, and also to direct which of the parties shall

Preamble.

Upon application by a defendant, in an action of *assumpsit*, &c. stating that the right in the subject matter is in a third party, the court may order such third party to appear, and maintain or relinquish his claim; and in the meantime stay proceedings in such action.

Ante, 128, 9.

be plaintiff or defendant on such trial; or, with the consent of the plaintiff and such third party, their counsel or attornies, to dispose of the merits of their claims, and determine the same, in a summary manner; and to make such other rules and orders therein, as to costs and all other matters, as may appear to be just and reasonable.

Judgment and decision to be final.

Ante, 129.

II. And be it further enacted, that the judgment in any such action or issue as may be directed by the court or judge, and the decision of the court or judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them.

If such third party shall not appear, &c. the court may bar his claim against the original defendant.

Ante, 129.

III. And be it further enacted, that if such third party shall not appear upon such rule or order, to maintain or relinquish his claim, being duly served therewith, or shall neglect or refuse to comply with any rule or order to be made after appearance, it shall be lawful for the court or judge to declare such third party, and all persons claiming by, from, or under him, to be for ever barred from prosecuting his claim against the original defendant, his executors or administrators; saving nevertheless the right or claim of such third party against the plaintiff; and thereupon to make such order between such defendant and the plaintiff, as to costs and other matters, as may appear just and reasonable.

Proviso as to orders made by a single judge.

Ante, 129, 30.

IV. Provided always, and be it further enacted, that no order shall be made in pursuance of this act, by a single judge of the court of pleas of the said county palatine of *Durham*, who shall not also be a judge of one of the said courts at *Westminster*; and that every order to be made, in pursuance of this act, by a single judge, not sitting in open court, shall be liable to be rescinded or altered by the court, in like manner as other orders made by a single judge.

If a judge thinks the matter more fit for the decision of the court, he may refer it.

Ante, 130.

V. Provided also, and be it further enacted, that if upon application to a judge in the first instance, or in any later stage of the proceedings, he shall think the matter more fit for the decision of the court, it shall be lawful for him to refer the matter to the court; and thereupon the court shall and may hear and dispose of the same, in the same manner as if the proceeding had originally commenced by rule of court, instead of the order of a judge.

For relief of sheriffs, and other officers, in execution of process against

VI. And whereas difficulties sometimes arise in the execution of process against goods and chattels, issued by or under the authority of the said courts, by reason of claims made to such goods and chattels by assignees of bankrupts, and other persons not being

the parties against whom such process has issued, whereby sheriffs and other officers are exposed to the hazard and expence of actions ; and it is reasonable to afford relief and protection in such cases to such sheriff and other officers ; be it therefore further enacted, that when any such claim shall be made to any goods or chattels taken, or intended to be taken, in execution under any such process, or to the proceeds or value thereof, it shall and may be lawful to and for the court from which such process issued, (upon application of such sheriff or other officer, made before or after the return of such process, and as well before as after any action brought against such sheriff or other officer,) to call before them, by rule of court, as well the party issuing such process, as the party making such claim ; and thereupon to exercise, for the adjustment of such claims, and the relief and protection of the sheriff or other officer, all or any of the powers and authorities hereinbefore contained, and make such rules and decisions, as shall appear to be just, according to the circumstances of the case ; and the costs of all such proceedings shall be in the discretion of the court.

goods and chattels.

Ante, 189, 90.

VII. And be it further enacted, that all rules, orders, matters, and decisions, to be made and done in pursuance of this act, except only the *affidavits* to be filed, may, together with the declaration in the cause, (if any,) be entered of record, with a note in the margin, expressing the true date of such entry, to the end that the same may be evidence in future times, if required, and to secure and enforce the payment of costs directed by any such rule or order ; and every such rule or order so entered, shall have the force and effect of a judgment, except only as to becoming a charge on any lands, tenements, or hereditaments ; and in case any costs shall not be paid within *fifteen* days after notice of the taxation and amount thereof, given to the party ordered to pay the same, his agent or attorney, execution may issue for the same, by *feri facias*, or *capias ad satisfaciendum*, adapted to the case, together with the costs of such entry, and of the execution, if by *feri facias* ; and such writ and writs may bear *teste* on the day of issuing the same, whether in term or vacation ; and the sheriff or other officer, executing any such writ, shall be entitled to the same fees, and no more, as upon any similar writ grounded upon a judgment of the court.

Rules, orders, &c. made in pursuance of this act, may be entered of record, and made evidence.

Ante, 190, 192, 3.

Costs.

Ante, 193.

Teste of writs.

Ante, 193.

Sheriff's fees.

Ante, 193.

VIII. And whereas by a certain act made and passed in the last session of parliament, intituled *An act to improve the proceedings in*

Upon any application under 1 W. IV. c. 21.

and this act, the court to exercise such powers, and make such rules, as are given by or mentioned in this act.

Ante, 209, 10.

prohibition, and on writs of mandamus^a, it was, among other things, enacted, that it should be lawful for the court to which application may be made, for any such writ of *mandamus* as is therein in that behalf mentioned, to make rules and orders, calling not only upon the person to whom such writ may be required to issue, but also all and every other person having or claiming any right or interest in or to the matter of such writ, to shew cause against the issuing of such writ, and payment of the costs of the application; and upon the appearance of such other person, in compliance with such rules, or in default of appearance, after service thereof, to exercise all such powers and authorities, and make all such rules and orders, applicable to the case, as were or might be given or mentioned by or in any act passed, or to be passed, during that present session of parliament, for giving relief against adverse claims, made upon persons having no interest in the subject of such claims; And whereas no such act was passed during the then present session of parliament; be it therefore enacted, that upon any such application as is in the said act and hereinbefore mentioned, it shall be lawful for the court to exercise all such powers and authorities, and make all such rules and orders, applicable to the case, as are given or mentioned by or in this present act.

^a Stat. 1 W. IV. c. 21. *Ante*, 204, &c.

ACT

For Uniformity of Process, in personal Actions, in His Majesty's Courts of Law at Westminster.

(2 W. IV. c. 39.)

[23d MAY, 1832.]

Preamble.

WHEREAS the process for the commencement of personal actions, in his majesty's superior courts of law at *Westminster*, is, by reason of its great variety and multiplicity, very inconvenient in practice; for remedy thereof, be it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and

by the authority of the same, that the process in all such actions, commenced in either of the said courts, in cases where it is not intended to hold the defendant to special bail, or to proceed against a member of parliament, according to the provisions contained in the statute passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled '*An Act to amend the Laws relating to Bankrupts*,' shall, whether the action be brought by or against any person entitled to the privilege of peerage, or of parliament, or of the court wherein such action shall be brought, or of any other court, or to any other privilege, or by or against any other person, be according to the form contained in the schedule to this act annexed, marked No. 1^a: and which process may issue from either of the said courts, and shall be called a writ of *summons*; and in every such writ, and copy thereof, the place and county of the residence, or supposed residence of the party defendant, or wherein the defendant shall be or shall be supposed to be, shall be mentioned; and such writ shall be issued by the officer of the said courts respectively, by whom process serviceable in the county therein mentioned hath been heretofore issued from such court; and every such writ may be served, in the manner heretofore used, in the county therein mentioned, or within two hundred yards of the border thereof, and not elsewhere; and the person serving the same shall and is hereby required to indorse on the writ, the day of the month and week of the service thereof.

Serviceable process, for the commencement of personal actions.
Ante, 61. 64.

Ante, 71.

Ante, 65.

Ante, 71, 2.

Ante, 73, 4.

Ante, 74.

II. And be it further enacted, that the mode of appearance to every such writ; or under the authority of this act, shall be by delivering a *memorandum* in writing, according to the form contained in the said schedule, and marked No. 2^b: such *memorandum* to be delivered to such officer or person as the court out of which the process issued shall direct, and to be dated on the day of the delivery thereof.

Mode of appearance to serviceable process.
Ante, 105.

III. And be it further enacted, that in case it shall be made appear by *affidavit*, to the satisfaction of the court out of which the process issued, or, in vacation, of any judge of either of the said courts, that any defendant has not been personally served with any such writ of *summons* as hereinbefore mentioned, and has not, according to the exigency thereof, appeared to the action, and cannot be compelled so to do, without some more efficacious process, then and in any such case it shall be lawful for such court, or judge, to

Appearance may be enforced by writ of *distingas*, in case a defendant cannot be served with the writ of *summons*.
Ante, 63. 78. 80. 82.

^a Append. Part III. Chap. IV, &c. § 9.

^b *Id.* Chap. XII § 7, &c.

Ante, 63. 81.

Ante, 83.

Ante, 85, 6.
104.

Bailable process,
for the com-
mencement of
personal actions.
Ante, 61. 87.
96, 7. 114.

order a writ of *distringas* to be issued, directed to the sheriff of the county wherein the dwelling-house or place of abode of such defendant shall be situate, or to the sheriff of any other county, or to any other officer to be named by such court or judge, in order to compel the appearance of such defendant; which writ of *distringas* shall be in the form, and with the notice subscribed thereto, mentioned in the schedule to this act, marked No. 3^a: which writ of *distringas* and notice, or a copy thereof, shall be served on such defendant, if he can be met with, or, if not, shall be left at the place where such *distringas* shall be executed; and a true copy of every such writ and notice shall be delivered, together therewith, to the sheriff or other officer to whom such writ shall be directed; and every such writ shall be made returnable on some day in term, not being less than *fifteen* days after the *teste* thereof, and shall bear *teste* on the day of the issuing thereof, whether in term or in vacation; and if such writ of *distringas* shall be returned *non est inventus* and *nulla bona*, and the party suing out such writ shall not intend to proceed to outlawry or waiver, according to the authority hereinafter given, and any defendant, against whom such writ of *distringas* issued, shall not appear at or within *eight* days inclusive after the return thereof, and it shall be made appear by *affidavit*, to the satisfaction of the court out of which such writ of *distringas* issued, or, in vacation, of any judge of either of the said courts, that due and proper means were taken and used to serve and execute such writ of *distringas*, it shall be lawful for such court, or judge, to authorize the party suing out such writ, to enter an appearance for such defendant, and to proceed thereon to judgment and execution.

IV. And be it further enacted, that in all such actions, wherein it shall be intended to arrest and hold any person to special bail, who may not be in the custody of the marshal of the Marshalsea of the court of King's Bench, or of the warden of the Fleet Prison, the process shall be by writ of *capias*, according to the form contained in the said schedule, and marked No. 4^b; and so many copies of such process, together with every *memorandum* or notice subscribed thereto, and all indorsements thereon, as there may be persons intended to be arrested thereon, or served therewith, shall be delivered therewith, to the sheriff or other officer or person to whom the same may be directed, or who may have the execution and return

^a Append. Part III. Chap. IV, &c. § 20.

^b *Id.* Chap. VII, &c. § 2.

thereof, and who shall, upon or forthwith after the execution of such process, cause one such copy to be delivered to every person upon whom such process shall be executed by him, whether by service or arrest; and shall indorse on such writ the true day of the execution thereof, whether by service or arrest: And if any defendant be taken or charged in custody upon any such process, and imprisoned for want of sureties for his appearance thereto, the plaintiff in such process may, before the end of the next term after the detainer or arrest of such defendant, declare against such defendant, and proceed thereon, in the manner and according to the directions contained in a certain act of parliament, made in the fourth and fifth years of the reign of King *William* and Queen *Mary*, intituled *An Act for delivering Declarations against Prisoners:* Provided always, that it shall be lawful for the plaintiff, or his attorney, to order the sheriff, or other officer or person to whom such writ shall be directed, to arrest one or more only of the defendants therein named, and to serve a copy thereof on one or more of the others; which order shall be duly obeyed by such sheriff, or other officer or person: and such service shall be of the same force and effect, as the service of the writ of summons hereinbefore mentioned, and no other.

Ante, 112.

4 & 5 W. & M.
c. 21.

Ante, 67, 8. 95.

V. And be it further enacted, that upon the return of *non est inventus*, as to any defendant against whom such writ of *capias* shall have been issued, and also upon the return of *non est inventus* and *nulla bona*, as to any defendant against whom such writ of *distringas* as hereinbefore mentioned shall have issued, whether such writ of *capias* or *distringas* shall have issued against such defendant only, or against such defendant and any other person or persons, it shall be lawful, until otherwise provided for, to proceed to outlaw or waive such defendant, by writs of *exigi facias*, and proclamation, and otherwise, in such and the same manner as may now be lawfully done, upon the return of *non est inventus* to a *pluries* writ of *capias ad respondendum*, issued after an *original writ*: Provided always, that every such writ of *exigent*, proclamation, and other writ subsequent to the writ of *capias* or *distringas*, shall be made returnable on a day certain in term; and every such first writ of *exigent* and proclamation shall bear *teste* on the day of the return of the writ of *capias* or *distringas*, whether such writ be returned in term or in vacation; and every subsequent writ of *exigent* and proclamation shall bear *teste* on the day of the return of the next preceding writ; and no such writ of *capias* or *distringas* shall

Proceedings to
outlawry.

Ante, 68, 4. 98,
9, 100.

Ante, 83. 92.
107.

Proceedings to
outlawry may be
had, after judg-
ment given un-
der the authority
of this act.

Ante, 99, 100.

Filazer to be ap-
pointed in the
court of Exche-
quer.

Ante, 100.

Mode of detain-
ing a prisoner in
the custody of
the marshal, or
warden of the
Fleet.

Ante, 61. 114,
15.

Mode of pro-
ceeding against
a member of
parliament, to

be sufficient, for the purpose of outlawry or waiver, if the same be returned within less than *fifteen* days after the delivery thereof to the sheriff, or other officer, to whom the same shall be directed.

VI. And be it further enacted, that after judgment given in any action commenced by writ of *summons* or *capias*, under the authority of this act, proceedings to outlawry or waiver may be had and taken, and judgment of outlawry or waiver given, in such manner, and in such cases, as may now be lawfully done, after judgment in an action commenced by *original* writ: Provided always, that every outlawry or waiver had under the authority of this act, shall and may be vacated or set aside, by writ of error or motion, in like manner as outlawry or waiver founded on an *original* writ may now be vacated or set aside.

VII. And be it further enacted, that for the purpose of proceeding to outlawry and waiver, upon such writs of *capias* or *distringas*, returnable in the court of Exchequer, it shall and may be lawful for the lord chief baron of the said court, and he is thereby required, to appoint, from time to time, a fit person, holding some other office in the said court, to execute the duties of a *filazer*, *exigenter*, and clerk of the *outlawries*, in the same court.

VIII. And be it further enacted, that when it shall be intended to detain, in any such action, any person being in the custody of the marshal of the Marshalsea of the court of King's Bench, or of the warden of the *Fleet* Prison, the process of *detainer* shall be according to the form of the writ of *detainer* contained in the said schedule, and marked No. 5^a; and a copy of such process, and of all indorsements thereon, shall be delivered, together with such process, to the said marshal or warden, to whom the same shall be directed, and who shall forthwith serve such copy upon the defendant personally, or leave the same at his room, lodging, or other place of abode; and such process may issue from either of the said courts; and the declaration thereupon shall and may allege the prisoner to be in the custody of the said marshal or warden, as the fact may be; and the proceedings shall be as against prisoners in the custody of the sheriff, unless otherwise ordered by some rule to be made by the judges of the said courts.

IX. And be it further enacted, that in all such actions, wherein it shall be intended to proceed against a member of parliament, according to the provisions of the said statute, made in the sixth

year of the reign of his late Majesty King *George* the Fourth, the process shall be according to the form contained in the said schedule, marked No. 6^a: and which process, and a copy thereof, shall be in lieu of the *summons*, or original *bill* and *summons*, and copy thereof, mentioned in the said statute.

enforce stat. 6
Geo. IV. c. 16.
§ 10.
Ante, 75.

X. And be it further enacted, that no writ, issued by authority of this act, shall be in force for more than *four* calendar months from the day of the date thereof, including the day of such date; but every writ of *summons* and *capias* may be continued by *alias* and *pluries*, as the case may require, if any defendant therein named may not have been arrested thereon, or served therewith: Provided always, that no *first* writ shall be available, to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon, or served therewith, or proceedings to or toward outlawry shall be had thereupon, or unless such writ, and every writ (if any) issued in continuation of a preceding writ, shall be returned *non est inventus*, and entered of record, within *one* calendar month next after the expiration thereof, including the day of such expiration; and unless every writ, issued in continuation of a preceding writ, shall be issued within *one* such calendar month after the expiration of the preceding writ, and shall contain a *memorandum*, indorsed thereon, or subscribed thereto, specifying the day of the date of the first writ; and return to be made, in bailable process, by the sheriff or other officer to whom the writ shall be directed, or his successor in office, and, in process not bailable, by the plaintiff or his attorney suing out the same, as the case may be.

Duration of writs.
Ante, 69.
Ante, 51. 63.
73. 76, 7.

Proviso as to statute of limitations.
Ante, 51. 77.
107, 8.

XI. And whereas, according to the present practice, in certain cases, no proceedings can be effectually had on any writ returnable within *four* days of the end of any term, until the beginning of the ensuing term, whereby an unnecessary delay is sometimes created; for remedy thereof, be it enacted, that if any writ of *summons*, *capias*, or *detainer*, issued by authority of this act, shall be served or executed on any day, whether in term or vacation, all necessary proceedings to judgment and execution may, except as hereinafter provided, be had thereon, without delay, at the expiration of *eight* days from the service or execution thereof, on whatever day the last of such *eight* days may happen to fall, whether in term or vacation: Provided always, that if the last of

Proceedings on writs, served or executed at certain times.
Ante, 100, 101.

Proviso for Sunday, &c.
Ante, 100, 101.

^a Append. Part III. Chap. IV, &c. § 8.

such *eight* days shall in any case happen to fall on a *Sunday*, *Christmas day*, or any day appointed for a public fast or thanksgiving, in either of such cases, the following day shall be considered as the last of such *eight* days; and if the last of such *eight* days shall happen to fall on any day between the *Thursday* before, and the *Wednesday* after *Easter day*, then, in every such case, the *Wednesday* after *Easter day* shall be considered as the last of such *eight* days: Provided also, that if such writ shall be served or executed on any day between the *tenth* day of *August* and the *twenty-fourth* day of *October* in any year, special bail may be put in by the defendant in bailable process, or appearance entered, either by the defendant or the plaintiff, on process not bailable, at the expiration of such *eight* days: Provided also, that no declaration, or pleading after declaration, shall be filed or delivered between the said *tenth* day of *August* and *twenty-fourth* day of *October*.

Date and teste
of writs.

Ante, 68. 63.
91, 2.

Indorsement of
name, and place
of abode, of at-
torney, or party
suing.

Ante, 69.

Service of writs
of summons on
corporations,
and on inhabit-
ants of hundreds,
and towns.

Ante, 74.

XII. And be it further enacted, that every writ, issued by authority of this act, shall bear *date* on the day on which the same shall be issued; and shall be *tested* in the name of the lord chief justice, or lord chief baron, of the court from which the same shall issue, or, in case of a vacancy of such office, then in the name of a *senior puisne* judge of the said court; and shall be indorsed with the name and place of abode of the attorney actually suing out the same; and in case such attorney shall not be an attorney of the court in which the same is sued out, then also with the name and place of abode of the attorney of such court, in whose name such writ shall be taken out; but in case no attorney shall be employed for that purpose, then with a *memorandum*, expressing that the same has been sued out by the plaintiff in person, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house, of such plaintiff's residence, if any such there be.

XIII. And be it further enacted, that every such writ of *summons*, issued against a corporation aggregate, may be served on the mayor, or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation; and every such writ issued against the inhabitants of a hundred, or other like district, may be served on the high constable thereof, or any one of the high constables thereof; and every such writ issued against the inhabitants of any county of any city or town, or the inhabitants of any franchise, liberty, city, town, or place, not being part of a hundred, or other like district, on some peace officer thereof.

XIV. And be it further enacted, that it shall and may be lawful to and for the judges of the said courts, and they are required, from time to time, to make all such general rules and orders, for the effectual execution of this act, and of the intention and object hereof, and for fixing the costs to be allowed for and in respect of the matters herein contained, and the performance thereof, as in their judgment shall be deemed necessary or proper; and for that purpose to meet, as soon as conveniently may be, after the passing hereof.

General rules to be made by the judges.

Ante, 117.

XV. And be it further enacted, that it shall be lawful, in term time, for the court out of which any writ issued by authority of this act, or any writ of *capias ad satisfaciendum*, *feri facias*, or *elegit*, shall have issued, to make rules, and also for any judge of either of the said courts, in vacation, to make orders for the return of any such writ; and every such order shall be of the same force and effect, as a rule of court made for the like purpose: Provided always, that no attachment shall issue for disobedience thereof, until the same shall have been made a rule of court.

Rules and orders may be made for the return of writs.

Ante, 108.

XVI. And be it further enacted, that all such proceedings as are mentioned in any writ, notice, or warning, issued under this act, shall and may be had and taken, in default of a defendant's appearance, or putting in special bail, as the case may be.

Proceedings in default of appearance, or special bail.

Ante, 93.

XVII. And be it further enacted, that every attorney, whose name shall be indorsed on any writ issued by authority of this act, shall, on demand in writing made by or on behalf of any defendant, declare forthwith whether such writ has been issued by him, or with his authority or privity; and if he shall answer in the affirmative, then he shall also, in case the court, or any judge of the same, or of any other court, shall so order and direct, declare in writing, within a time to be allowed by such court or judge, the profession, occupation, or quality, and place of abode, of the plaintiff, on pain of being guilty of a contempt of the court from which such writ shall appear to have been issued; and if such attorney shall declare that the writ was not issued by him, or with his authority or privity, the said court, or any judge of either of the said courts, shall and may, if it shall appear reasonable so to do, make an order for the immediate discharge of any defendant or defendants, who may have been arrested on any such writ, on entering a common appearance.

Attorney to declare whether writ issued by his authority; and to declare name and place of abode of his client, if ordered.

Ante, 70. 105.

If writ not issued by authority of the attorney, the defendant may be discharged.

XVIII. And be it further enacted, that it shall and may be lawful to and for the judges of each of the said courts, from time to

Rules to be made by the courts for the

government of
their ministers
and officers.

Ante, 72.

Proviso for per-
sons privileged
from arrest, &c.

Ante, 65. 67.
98.

Ante, 51. 62, 3.

Places, parcel of
one county, and
situate in an-
other, to be
deemed part of
each.

Ante, 74. 96.

Writs herein-
before author-
ized, to be the
only writs for
commencement
of personal ac-
tions.

Ante, 50, 51.
61. 82..120.

Costs.

Ante, 73.

Counties pala-
tine.

Ante, 82.

Commencement
of act.

Act may be al-
tered this ses-
sion.

time, to make such rules and orders for the government and conduct of the ministers and officers of their respective courts, in and relating to the distribution and performance of the duties and business to be done and performed in the execution of this act, as such judges may think fit and reasonable; provided always, that no additional charge be thereby imposed on the suitors.

XIX. Provided always, and be it further enacted, that nothing in this act contained shall subject any person to arrest, outlawry, or waiver, who, by reason of any privilege, usage, or otherwise, may now by law be exempt therefrom: or shall extend to any cause removed into either of the said courts, by writ of *pone*, *certiorari*, *recordari facias loquelam*, *habeas corpus*, or otherwise.

XX. And whereas there are, in divers parts of *England*, certain districts and places, parcel of some one county, but wholly situate within and surrounded by some other county, which is productive of inconvenience and delay in the service and execution of the process of the said courts; for remedy thereof, be it enacted, that every such district and place shall and may, for the purpose of the service and execution of every writ and process, whether meane or judicial, issued out of either of the said courts, be deemed and taken to be part as well of the county wherein such district or place is so situate as aforesaid, as of the county whereof the same is parcel; and every such writ and process may be directed accordingly, and executed in either of such counties.

XXI. And be it further enacted, that from the time when this act shall commence and take effect, the writs hereinbefore authorized shall be the only writs for the commencement of personal actions, in any of the courts aforesaid, in the cases to which such writs are applicable; and the costs to be allowed and charged for such writs, shall be the same as for writs of *latitat*: Provided always, that nothing in this act contained shall abridge, alter, or affect the franchises and jurisdictions of either of the counties palatine of *Lancaster* or *Durham*, or of any officer or minister thereof.

XXII. And be it further enacted, that this act shall commence and take effect on the first day of *Michaelmas* term, next after the passing hereof.

XXIII. And be it further enacted, that this act may be amended, altered, or repealed, during the present session of parliament.

SCHEDULE to which the foregoing Act refers.

[The Forms of writs, &c. in this Schedule, will be found in the *Appendix*, Part III. as referred to in the body of the work.]

 ACT

*For the further Amendment of the Law, and the better
Advancement of Justice.*

(3 & 4 W. IV. c. 42.)

[14TH AUGUST, 1833.]

WHEREAS it would greatly contribute to the diminishing of expence Preamble.
in suits in the superior courts of common law at *Westminster*, if the
pleadings therein were in some respects altered, and the questions
to be tried by the jury left less at large than they now are, accord-
ing to the course and practice of pleading in several forms of action;
but this cannot be conveniently done, otherwise than by rules or
orders of the judges of the said courts, from time to time to be
made; and doubts may arise as to the power of the said judges to
make such alterations, without the authority of parliament: Be it
therefore enacted, by the King's most excellent Majesty, by and
with the advice and consent of the lords spiritual and temporal,
and commons, in this present parliament assembled, and by the au-
thority of the same, that the judges of the said superior courts, or
any eight or more of them, of whom the chiefs of each of the said
court shall be three, shall and may, by any rule or order to be from
time to time by them made, in term or vacation, at any time within
five years from the time when this act shall take effect, make such
alterations in the mode of pleading in the said courts, and in the
mode of entering and transcribing pleadings, judgments, and other
proceedings in actions at law, and such regulations as to the pay-
ment of costs and otherwise, for carrying into effect the said
alterations, as to them may seem expedient; and all such rules,
orders, or regulations, shall be laid before both houses of parliament,

Judges to have
power to make
alterations in
the mode of
pleading in the
superior courts,
&c.

Ante, 143, 4.

if parliament be then sitting, immediately upon the making of the same, or, if parliament be not sitting, then within *five* days after the next meeting thereof; and no such rule, order, or regulation, shall have effect, until *six* weeks after the same shall have been so laid before both houses of parliament; and any rule or order so made shall, from and after such time aforesaid, be binding and obligatory on the said courts, and all other courts of common law, and on all courts of error into which the judgments of the said courts, or any of them, shall be carried by any writ of error, and be of the like force and effect, as if the provisions contained therein had been expressly enacted by parliament: Provided always, that no such rule or order shall have the effect of depriving any person of the power of pleading the general issue, and giving the special matter in evidence, in any case wherein he is now or hereafter shall be entitled to do so, by virtue of any act of parliament, now or hereafter to be in force.

Not to deprive any person of the power of pleading the general issue.

Executors may bring actions, for injuries to the real estates of the deceased.
Ante, 15.

II. And whereas there is no remedy provided by law, for injuries to the real estate of any person deceased, committed in his lifetime, nor for certain wrongs done by a person deceased in his lifetime to another, in respect of his property, real or personal; for remedy thereof be it enacted, that an action of *trespass*, or *trespass on the case*, as the case may be, may be maintained by the executors or administrators of any person deceased, for any injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within *six* calendar months before the death of such deceased person, and provided such action shall be brought within *one* year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person; and further, that an action of *trespass*, or *trespass on the case*, as the case may be, may be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another, in respect of his property, real or personal, so as such injury shall have been committed within *six* calendar months before such person's death, and so as such action shall be brought within *six* calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action, shall be payable in like order of administration, as the simple contract debts of such person.

Actions may be brought against executors, for an injury to property, real or personal, by their testator.
Ante, 15.

III. And be it further enacted, that all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt, or *scire facias*, upon any recognizance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any *feri facias*, and all actions for penalties, damages, or sums of money, given to the party grieved, by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of parliament, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of debt for rent upon an indenture of demise, or covenant or debt upon any bond or other specialty, actions of debt or *scire facias* upon recognizance, within *ten* years after the end of this present session, or within *twenty* years after the cause of such actions or suits, but not after; the said actions by the party grieved, *one* year after the end of this present session, or within *two* years after the cause of such actions or suits, but not after; and the said other actions within *three* years after the end of this present session, or within *six* years after the cause of such actions or suits, but not after; provided that nothing herein contained shall extend to any action given by any statute, where the time for bringing such action is or shall be by any statute specially limited.

Limitation of actions of debt on specialties, &c.
Ante, 43.

IV. And be it further enacted, that if any person or persons that is or are or shall be entitled to any such action or suit, or to such *scire facias*, is or are or shall be, at the time of any such cause of action accrued, within the age of *twenty-one* years, *feme covert*, *non compos mentis*, or beyond the seas, then such person or persons shall be at liberty to bring the same actions, so as they commence the same within such times, after their coming to or being of full age, discover, of sound memory, or returned from beyond the seas, as other persons having no such impediment should, according to the provisions of this act, have done; and that if any person or persons against whom there shall be any such cause of action, is or are, or shall be at the time such cause of action accrued, beyond the seas, then the person or persons entitled to any such cause of action shall be at liberty to bring the same, against such person or persons, within such times as are

Remedy for infants, *femes covert*, &c.
Ante, 43, 4.

Absence of defendants beyond seas provided for.
Ante, 44.

before limited, after the return of such person or persons from beyond the seas.

Proviso, in case of acknowledgment in writing, or by part payment.

Ante, 44.

V. Provided always, that if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty, or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions, to bring his or their action for the money remaining unpaid, and so acknowledged to be due, within *twenty* years after such acknowledgment, by writing or part payment, or part satisfaction as aforesaid; or in case the person or persons entitled to such action shall, at the time of such acknowledgment, be under such disability as aforesaid, or the party making such acknowledgment be, at the time of making the same, beyond the seas, then within *twenty* years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond seas, as the case may be; and the plaintiff or plaintiffs in any such action, or any indenture, specialty, or recognizance, may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of this statute.

The limitation after judgment or outlawry reversed.

Ante, 44, 5.

VI. And nevertheless be it enacted, if in any of the said actions, judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and, upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill, or if, in any of the said actions, the defendant shall be outlawed, and shall after reverse the outlawry, that in all such cases the party plaintiff, his executors or administrators, as the case shall require, may commence a new action or suit, from time to time, within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after.

No part of the united kingdom, &c. to be deemed beyond the seas, within the meaning of this act.

Ante, 45.

VII. And be it further enacted, that no part of the United Kingdom of *Great Britain* and *Ireland*, nor the islands of *Man*, *Guernsey*, *Jersey*, *Alderney*, and *Sark*, nor any islands adjacent to any of them, being part of the dominions of his majesty, shall be deemed to be beyond the seas, within the meaning of this act, or of the act passed in the *twenty-first* year of the reign of King *James* the First, intituled *An Act for Limitation of Actions, and for avoiding of Suits in Law*.

VIII. And be it further enacted, that no plea in abatement for the nonjoinder of any person as a co-defendant, shall be allowed in any court of common law, unless it shall be stated in such plea, that such person is resident within the jurisdiction of the court, and unless the place of residence of such person shall be stated, with convenient certainty, in an *affidavit* verifying such plea.

Restriction as to plea in abatement, for nonjoinder of a co-defendant.

Ante, 141.

IX. And be it further enacted, that to any plea in abatement, in any court of law, of the nonjoinder of another person, the plaintiff may reply that such person has been discharged by bankruptcy and certificate, or under an act for the relief of insolvent debtors.

Reply of plaintiff, to plea in abatement of nonjoinder.

Ante, 141.

X. And be it further enacted, that in all cases in which, after such plea in abatement, the plaintiff shall, without having proceeded to trial upon an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, if it shall appear by the pleadings in such subsequent action, or on the evidence at the trial thereof, that all the original defendants are liable, but that one or more of the persons named in such plea in abatement, or any subsequent plea in abatement, are not liable as a contracting party or parties, the plaintiff shall nevertheless be entitled to judgment, or to a verdict and judgment, as the case may be, against the other defendant or defendants who shall appear to be liable; and every defendant who is not so liable, shall have judgment, and shall be entitled to his costs, as against the plaintiff, who shall be allowed the same, as costs in the cause, against the defendant or defendants who shall have so pleaded in abatement the nonjoinder of such person: provided, that any such defendant, who shall have so pleaded in abatement, shall be at liberty on the trial, to adduce evidence of the liability of the defendants named by him in such plea in abatement.

Provision, in the case of subsequent proceedings against the persons named in a plea in abatement.

Ante, 141, 2.

XI. And be it further enacted, that no plea in abatement for a *misnomer* shall be allowed in any personal action; but that in all cases in which a *misnomer* would, but for this act, have been by law pleadable in abatement in such actions, the defendant shall be at liberty to cause the declaration to be amended, at the costs of the plaintiff, by inserting the right name, upon a judge's summons, founded on an *affidavit* of the right name; and in case such summons shall be discharged, the costs of such application shall be paid by the party applying, if the judge shall think fit.

Misnomer not to be pleaded in abatement.

Ante, 66. 91.

142.

Initials of names
may be used in
some cases.

Ante, 66. 91.

XII. And be it further enacted, that in all actions upon bills of exchange or promissory notes, or other written instruments, any of the parties to which are designated by the initial letter or letters, or some contraction of the christian or first name or names, it shall be sufficient, in every *affidavit* to hold to bail, and in the process or declaration, to designate such persons by the same initial letter or letters, or contraction of the christian or first name or names, instead of stating the christian or first name or names in full.

Wager of law to
be abolished.

Ante, 14.

Action of debt
on simple con-
tract.

Ante, 14.

Power to the
judges to make
regulations, as to
the admission of
written docu-
ments.

Ante, 167, 8.

XIII. And be it further enacted, that no wager of law shall be hereafter allowed.

XIV. And be it further enacted, that an action of debt on simple contract shall be maintainable, in any court of common law, against any executor or administrator.

XV. And whereas it is expedient to lessen the expence of the proof of written or printed documents, or copies thereof, on the trial of causes; be it further enacted, that it shall and may be lawful for the said judges, or any such eight or more of them as aforesaid, at any time within *five* years after this act shall take effect, to make regulations, by general rules or orders, from time to time, in term or in vacation, touching the voluntary admission, upon an application for that purpose, at a reasonable time before the trial, of one party to the other, of all such written or printed documents, or copies of documents, as are intended to be offered in evidence on the said trial, by the party requiring such admission, and touching the inspection thereof, before such admission is made, and touching the costs which may be incurred by the proof of such documents or copies, on the trial of the cause, in case of the omitting to apply for such admission, or the not producing of such document or copies, for the purpose of obtaining admission thereof, or of the refusal to make such admission, as the case may be, and as to the said judges shall seem meet; and all such rules and orders shall be binding and obligatory, in all courts of common law, and of the like force, as if the provisions therein contained had been expressly enacted by parliament.

Writs of inquiry,
under the statute
8 & 9 W. III.
c. 11. to be ex-
ecuted before
the sheriff, un-
less otherwise
ordered.

Ante, 134, 5.

XVI. And whereas it would also lessen the expence of trials, and prevent delay, if such writs of inquiry as hereinafter mentioned were executed, and such issues as hereinafter mentioned were tried, before the sheriff of the county where the venue is laid; be it therefore enacted, that all writs issued under and by virtue of the

statute passed in the session of parliament held in the eighth and ninth years of the reign of King *William* the Third, intituled *An act for the better preventing frivolous and vexatious suits*, shall, unless the court where such action is pending, or a judge of one of the said superior courts, shall otherwise order, direct the sheriff of the county where the action shall be brought, to summon a jury to appear before such sheriff, instead of the justices or justice of assize or *nisi prius* of that county, to inquire of the truth of the breaches suggested, and assess the damages that the plaintiff shall have sustained thereby; and shall command the said sheriff, to make return thereof to the court from whence the same shall issue, at a day certain, in term or in vacation, in such writ to be mentioned; and such proceedings shall be had, after the return of such writ, as are in the said statute in that behalf mentioned, in like manner as if such writ had been executed before a justice of assize or *nisi prius*.

XVII. And be it further enacted, that in any action depending in any of the said superior courts, for any debt or demand in which the sum sought to be recovered, and endorsed on the writ of summons, shall not exceed *twenty* pounds, it shall be lawful for the court in which such suit shall be depending, or any judge of any of the said courts, if such court or judge shall be satisfied that the trial will not involve any difficult question of fact or law, and such court or judge shall think fit so to do, to order and direct that the issue or issues joined shall be tried before the sheriff of the county where the action is brought, or any judge of any court of record for the recovery of debt in such county; and for that purpose a writ shall issue, directed to such sheriff, commanding him to try such issue or issues, by a jury to be summoned by him, and to return such writ, with the finding of the jury thereon indorsed, at a day certain, in term or in vacation, to be named in such writ; and thereupon such sheriff or judge shall summon a jury, and shall proceed to try such issue or issues.

Power to direct issues joined in certain actions, to be tried before the sheriff, or any judge of a court of record, &c.

Ante, 152, 3.

XVIII. And be it further enacted, that at the return of any such writ of inquiry, or writ for the trial of such issue or issues as aforesaid, costs shall be taxed, judgment signed, and execution issued forthwith, unless the sheriff, or his deputy, before whom such writ of inquiry may be executed, or such sheriff, deputy, or judge, before whom such shall be had, shall certify, under his hand, upon such writ, that judgment ought not to be signed, until the defendant shall have had an opportunity to apply to the court, for

Upon the return of a writ of inquiry, or a trial of issues, judgment to be signed, unless, &c.

Ante, 136, 7.

Sheriff, as to such issues, to have the like powers as judges at *nisi prius*.

Ante, 154.

Provisions of 1 W. IV. c. 7. to extend to such writs of inquiry, and issues.

Ante, 137.

Sheriffs to name deputies, to be resident in London.

Ante, 84.

Defendant to be allowed to pay money into court, in certain actions, by judge's order.

Ante, 139.

Power to direct local actions to

a new inquiry or trial, or a judge of any of the said courts shall think fit to order, that judgment or execution shall be stayed, till a day to be named in such order; and the verdict of such jury, on the trial of such issue or issues, shall be as valid, and of the like force, as a verdict of a jury at *nisi prius*; and the sheriff or his deputy, or judge, presiding at the trial of such issue or issues, shall have the like powers, with respect to amendment on such trial, as are hereinafter given to judges at *nisi prius*.

XIX. Provided also, that all and every the provisions contained in the statute made and passed in the first year of the reign of his present majesty, intituled *An Act for the more speedy Judgment and Execution in Actions brought in His Majesty's Courts of Law at Westminster, and in the Court of Common Pleas of the County Palatine of Lancaster, and for amending the Law as to Judgment on a Cognovit actionem in Cases of Bankruptcy*, shall, so far as the same are applicable thereto, be extended and applied to judgments and executions upon such writs of inquiry, and writs for the trials of issues, in like manner as if the same were expressly re-enacted herein.

XX. And be it further enacted, that from and after the first day of June one thousand eight hundred and thirty-three, the sheriff of each county in *England* and *Wales* shall severally name a sufficient deputy, who shall be resident, or have an office, within one mile from the *Inner Temple Hall*, for the receipt of writs, granting warrants thereon, making returns thereto, and accepting of all rules and orders to be made on, or touching the execution of any process or writ, to be directed to such sheriff.

XXI. And be it further enacted, that it shall be lawful for the defendant, in all personal actions, (except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation, or debauching of the plaintiff's daughter or servant,) by leave of any of the said superior courts where such action is pending, or a judge of any of the said superior courts, to pay into court a sum of money, by way of compensation or amends, in such manner, and under such regulations, as to the payment of costs, and the form of pleading, as the said judges, or such eight or more of them as aforesaid, shall, by any rules or orders by them to be from time to time made, order and direct.

XXII. And whereas unnecessary delay and expence is sometimes occasioned, by the trial of local actions in the county where

the cause of action has arisen; be it therefore enacted, that in any action depending in any of the said superior courts, the venue in which is by law local, the court in which such action shall be depending, or any judge of any of the said courts, may, on the application of either party, order the issue to be tried, or writ of inquiry to be executed, in any other county or place than that in which the venue is laid; and for that purpose, any such court or judge may order a suggestion to be entered on the record, that the trial may be more conveniently had, or writ of inquiry executed, in the county or place where the same is ordered to take place.

XXIII. And whereas great expence is often incurred, and delay or failure of justice takes place, at trials, by reason of variances, as to some particular or particulars, between the proof and the record, or setting forth on the record or document on which the trial is had, of contracts, customs, prescriptions, names, and other matters or circumstances, not material to the merits of the case, and by the mis-statement of which the opposite party cannot have been prejudiced, and the same cannot in any case be amended at the trial, except where the variance is between any matter in *writing* or in *print*, produced in evidence, and the record: And whereas it is expedient to allow such amendments as hereinafter mentioned to be made on the trial of the cause; be it therefore enacted, that it shall be lawful for any court of record, holding plea in civil actions, and any judge sitting at *nisi prius*, if such court or judge shall see fit so to do, to cause the record, writ, or document, on which any trial may be pending before any such court or judge, in any civil action, or in any information in the nature of a *quo warranto*, or proceedings on a *mandamus*, when any variance shall appear between the proof, and the recital or setting forth on the record, writ, or document on which the trial is proceeding, of any contract, custom, prescription, name, or other matter, in any particular or particulars in the judgment of such court or judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence, to be forthwith amended, by some officer of the court or otherwise, both in the part of the pleadings where such variance occurs, and in every other part of the pleadings which it may become necessary to amend, on such terms, as to payment of costs to the other party, or postponing the trial to be had before the same or another jury, or both payment

be tried in any county.

Ante, 138.

Allowing amendments to be made, when any variance appears between the proof, and the recital or setting forth on the record, of any contract, &c. in any particular not material to the merits of the case, and by which the opposite party cannot have been prejudiced.

Ante, 147, 8, 9.

Terms of amendment.

Trial to proceed, after amendment, as if no variance had appeared.

Order for amendment to be indorsed on *postea*, and entered on roll.

Party dissatisfied with decision of judge, may apply to the court for new trial.

Power for the court, or judge, to direct the facts to be found specially.
Ante, 149.

of costs and postponement, as such court or judge shall think reasonable; and in case such variance shall be in some particular or particulars, in the judgment of such court or judge not material to the merits of the case, but such as that the opposite party may have been prejudiced thereby, in the conduct of his action, prosecution, or defence, then such court or judge shall have power to cause the same to be amended, upon payment of costs to the other party, and withdrawing the record, or postponing the trial as aforesaid, as such court or judge shall think reasonable; and after any such amendment, the trial shall proceed, in case the same shall be proceeded with, in the same manner in all respects, both with respect to the liability of witnesses to be indicted for perjury, and otherwise, as if no such variance had appeared; and in case such trial shall be had at *nisi prius*, or by virtue of such writ as aforesaid, the order for the amendment shall be indorsed on the *postea* or the writ, as the case may be, and returned, together with the record or writ, and thereupon such papers, rolls, and other records of the court from which such record or writ issued, as it may be necessary to amend, shall be amended accordingly; and in case the trial shall be had in any court of record, then the order for amendment shall be entered on the roll or other document upon which the trial shall be had: provided, that it shall be lawful for any party who is dissatisfied with the decision of such judge at *nisi prius*, sheriff, or other officer, respecting his allowance of any such amendment, to apply to the court from which such record or writ issued, for a new trial upon that ground; and in case any such court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the court shall think fit, or the court shall make such other order, as to them may seem meet.

XXIV. And be it further enacted, that the said court or judge shall and may, if they or he think fit, in all such cases of variance, instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts according to the evidence; and thereupon such finding shall be stated on such record or document, and, notwithstanding the finding on the issue joined, the said court, or the court from which the record has issued, shall, if they shall think the said variance immaterial to the merits of the case, and the mis-statement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case.

XXV. And be it further enacted, that it shall be lawful for the parties in any action or information, after issue joined, by consent, and by order of any of the judges of the said superior courts, to state the facts of the case, in the form of a special case, for the opinion of the court; and to agree that a judgment shall be entered for the plaintiff or defendant, by confession, or of *nolle prosequi*, immediately after the decision of the case, or otherwise as the court may think fit; and judgment shall be entered accordingly.

Power to state a special case, without proceeding to trial.

Ante, 155.

XXVI. And in order to render the rejection of witnesses on the ground of interest less frequent, be it further enacted, that if any witness shall be objected to as incompetent, on the ground that the verdict or judgment, in the action on which it shall be proposed to examine him, would be admissible in evidence for or against him, such witness shall nevertheless be examined; but in that case a verdict or judgment in that action, in favour of the party on whose behalf he shall have been examined, shall not be admissible in evidence for him, or any one claiming under him; nor shall a verdict or judgment against the party on whose behalf he shall have been examined, be admissible in evidence against him, or any one claiming under him.

Witnesses interested solely on account of the verdict, to be admissible.

Ante, 168.

XXVII. And be it further enacted, that the name of every witness objected to as incompetent, on the ground that such verdict or judgment would be admissible in evidence for or against him, shall at the trial, be indorsed on the record or document on which the trial shall be had, together with the name of the party on whose behalf he was examined, by some officer of the court, at the request of either party, and shall be afterwards entered on the record of the judgment; and such indorsement, or entry, shall be sufficient evidence that such witness was examined, in any subsequent proceeding, in which the verdict or judgment shall be offered in evidence.

Direction to indorse the name of the witness on the record.

Ante, 168.

XXVIII. And be it further enacted, that upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debt or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the

Jury empowered to allow interest upon debts.

Ante, 172.

debtor, that interest will be claimed from the date of such demand, until the term of payment: provided, that interest shall be payable in all cases, in which it is now payable by law.

In certain actions, the jury may give damages, in the nature of interest.
Ante, 178.

XXIX. And be it further enacted, that the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in all actions of trover, or trespass *de bonis asportatis*; and over and above the money recoverable, in all actions on policies of assurance, made after the passing of this act.

Interest to be allowed on all writs of error, for the time that execution has been delayed.
Ante, 174.

XXX. And be it further enacted, that if any person shall sue out any writ of error, upon any judgment whatsoever, given in any court, in any action personal, and the court of error shall give judgment for the defendant thereon, then interest shall be allowed by the court of error, for such time as execution has been delayed by such writ of error, for the delaying thereof.

Executors, suing in right of the testator, to pay costs.
Ante, 179.

XXXI. And be it further enacted, that in every action brought by any executor or administrator, in right of the testator or intestate, such executor or administrator shall, unless the court in which such action is brought, or a judge of any of the said superior courts, shall otherwise order, be liable to pay costs to the defendant, in case of being nonsuited, or a verdict passing against the plaintiff, and in all other cases in which he would be liable, if such plaintiff were suing in his own right, upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner.

One or more of several defendants in any action, having a *nolle prosequi*, or a verdict, shall have costs.
Ante, 180, 81.

XXXII. And be it further enacted, that where several persons shall be made defendants in any personal action, and any one or more of them shall have a *nolle prosequi* entered as to him or them, or, upon the trial of such action, shall have a verdict pass for him or them, every such person shall have judgment for, and recover his reasonable costs; unless, in the case of a trial, the judge before whom such cause shall be tried, shall certify upon the record, under his hand, that there was a reasonable cause for making such person a defendant in such action.

Where *nolle prosequi* entered upon any count, &c.
Ante, 180.

XXXIII. And be it further enacted, that where any *nolle prosequi* shall have been entered upon any count, or as to part of any declaration, the defendant shall be entitled to, and have judgment for, and recover his reasonable costs in that behalf.

Plaintiff in *scire facias*, and plaintiff or defendant

XXXIV. And be it further enacted, that in all writs of *scire facias*, the plaintiff obtaining judgment on [or] an award of execution,

shall recover his costs of suit, upon a judgment by default, as well as upon a judgment after plea pleaded, or demurrer joined; and that where judgment shall be given either for or against a plaintiff or demandant, or for or against a defendant or tenant, upon any demurrer joined in any action whatever, the party in whose favour such judgment shall be given, shall also have judgment to recover his costs in that behalf.

on demurrer, to have costs.

Ante, 181, 2.

XXXV. And whereas it is provided in and by a statute passed in the sixth year of the reign of his late Majesty, intituled *An Act for consolidating and amending the Law relative to Jurors and Juries*, that the person or party who shall apply for a special jury, shall pay the fees for striking such jury, and all the expences occasioned by the trial of the cause by the same; and shall not have any further or other allowance for the same, upon taxation of costs, than such person or party would be entitled unto, in case the cause had been tried by a common jury, unless the judge before whom the cause is tried shall, immediately after the verdict, certify under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury: And whereas the said provision does not apply to cases in which the plaintiff has been nonsuited, and it is expedient that the judge should have such power of certifying, as well when a plaintiff is nonsuited, as when he has a verdict against him; be it therefore enacted, that the said provision of the said last-mentioned act of parliament, and every thing therein contained, shall apply to cases in which the plaintiff shall be nonsuited, as well as to cases in which a verdict shall pass against him.

Costs of special juries, in case of a nonsuit.

6 Geo. IV. c. 50.

Ante, 157.

XXXVI. And whereas it would tend to the better dispatch of business, and would be more convenient, and better assimilate the practice, and promote uniformity in the allowance of costs, if the officers on the plea side of the court of King's Bench and Exchequer, and the officers of the court of Common Pleas at Westminster, who now perform the duties of taxing costs, were to be empowered to tax costs which have arisen, or may arise in each of the said courts indiscriminately; be it therefore enacted, that it shall be lawful for the judges of the said courts, or such eight or more of them as aforesaid, by any rule or order to be from time to time made, in term or vacation, to make such regulations for the taxation of costs, by any of the said officers of the said courts indiscriminately, as to them may seem expedient, although such costs may not have arisen in respect of business done in the court to

Power to make regulations, as to the officers of each court at Westminster taxing costs.

Ante, 182.

which such officer belongs ; and to appoint some convenient place, in which the business of taxation shall be transacted for all the said courts, and to alter the same, when and as it may seem to them expedient.

Executors of
lessor may dis-
train for arrears
in his lifetime.

Bradb. Dist.
82, 3.

XXXVII. And be it further enacted, that it shall be lawful for the executors or administrators of any lessor or landlord, to distrain upon the lands demised for any term, or at will, for the arrearages of rent due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done in his lifetime.

Arrears may be
distrained for,
within six
months after de-
termination of
term.

Bradb. Dist. 127.

XXXVIII. And be it further enacted, that such arrearages may be distrained for, after the end or determination of such term, or lease at will, in the same manner as if such term or lease had not been ended or determined ; provided that such distress be made within the space of *six* calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due ; Provided also, that all and every the powers and provisions in the several statutes made relating to distresses for rent, shall be applicable to the distresses so made as aforesaid.

Submission to
arbitration by
rule of court,
&c. not to be re-
vocable, without
leave of the
court.

Ante, 169.

XXXIX. And whereas it is expedient to render references to arbitration more effectual ; be it further enacted, that the power and authority of any arbitrator or umpire, appointed by or in pursuance of any rule of court, or judge's order, or order of *Nisi Prius*, in any action now brought, or which shall be hereafter brought, or by or in pursuance of any submission to reference, containing an agreement that such submission shall be made a rule of any of his Majesty's courts of record, shall not be revocable by any party to such reference, without the leave of the court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a judge ; and the arbitrator or umpire shall and may, and is hereby required to proceed with the reference, notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference ; and that the court, or any judge thereof, may from time to time enlarge the term for any such arbitrator making his award.

Power to compel
the attendance
of witnesses.

Ante, 170.

XL. And be it further enacted, that when any reference shall have been made by any such rule or order as aforesaid, or by any submission containing such agreement as aforesaid, it shall be lawful for the court by which such rule or order shall be made, or

which shall be mentioned in such agreement, or for any judge, by rule or order to be made for that purpose, to command the attendance and examination of any person to be named, or the production of any documents to be mentioned in such rule or order; and the disobedience to any such rule or order shall be deemed a contempt of court, if, in addition to the service of such rule or order, an appointment of the time and place of attendance in obedience thereto, signed by one at least of the arbitrators, or by the umpire, before whom the attendance is required, shall also be served, either together with, or after the service of such rule or order: Provided always, that every person, whose attendance shall be so required, shall be entitled to the like conduct money, and payment of expences, and for loss of time, as for and upon attendance at any trial: Provided also, that the application made to such court or judge, for such rule or order, shall set forth the county where such witness is residing at the time, or satisfy such court or judge that such person cannot be found: Provided also, that no person shall be compelled to produce, under any such rule or order, any writing or other document, that he would not be compelled to produce at a trial, or to attend at more than *two* consecutive days, to be named in such order.

XXI. And be it further enacted, that when, in any rule or order of reference, or in any submission to arbitration, containing an agreement that the submission shall be made a rule of court, it shall be ordered or agreed, that the witnesses upon such reference shall be examined upon oath, it shall be lawful for the arbitrator or umpire, or any one arbitrator, and he or they are hereby authorized and required, to administer an oath to such witnesses, or to take their affirmation, in cases where affirmation is allowed by law, instead of oath; and if, upon such oath or affirmation, any person making the same shall wilfully and corruptly give any false evidence, every person so offending, shall be deemed and taken to be guilty of perjury, and shall be prosecuted and punished accordingly.

Power for the arbitrators, under a rule of court, to administer an oath.

Ante, 170.

XLII. And whereas it would be convenient, if the power of the superior courts of common law and equity at *Westminster* to grant commissions for taking *affidavits*, to be used in the said courts respectively, should be extended; be it further enacted, by the authority aforesaid, that the lord high chancellor, lord keeper, or lords commissioners of the great seal, the said courts of law, and the several judges of the same, shall have such and the same

Power of granting commissions to take affidavits, to extend to Scotland and Ireland.

Ante, 94, 5.

powers for granting commissions, for taking and receiving *affidavits* in *Scotland* and *Ireland*, to be used and read in the said courts respectively, as they now have in all and every the shires and counties within the kingdom of *England*, and dominion of *Wales*, and town of *Berwick-upon-Tweed*, and in the isle of *Man*, by virtue of the statutes now in force; and that all and every person and persons, wilfully swearing or affirming falsely, in any *affidavit* to be made before any person or persons who shall be so empowered to take *affidavits*, under the authority aforesaid, shall be deemed guilty of perjury, and shall incur and be liable to the same pains and penalties, as if such person had wilfully sworn or affirmed falsely, in the open court in which such *affidavit* shall be entitled, and be liable to be prosecuted for such perjury, in any court of competent jurisdiction, in that part of the united kingdom in which such offence shall have been committed, or in that part of the united kingdom, in which such person shall be apprehended on such a charge.

For the abolition
of certain holi-
days.

Ante, 56.

5 & 6 Edw. VI.
c. 3.

Commencement
of act.

Not to extend
to *Ireland* or
Scotland.

XLIII. And whereas the observance of holidays, in the said courts of common law, during term time, and in the offices belonging to the same, on the several days on which holidays are now kept, is very inconvenient, and tends to delay in the administration of justice; be it therefore enacted, by the authority aforesaid, that none of the several days mentioned in the statute passed in the sessions of parliament holden in the fifth and sixth years of the reign of King *Edward* the Sixth, intituled *An act for keeping holidays, and fasting days*, shall be observed or kept in the said courts, or in the several offices belonging thereto, except *Sundays*, the day of the Nativity of our Lord, and the three following days, and *Monday* and *Tuesday* in *Easter* week.

XLIV. And be it further enacted, that this statute shall commence and take effect on the *first* day of *June* one thousand eight hundred and thirty-three.

XLV. And be it further enacted, that nothing in this act shall extend to that part of the united kingdom called *Ireland*, or that part of the united kingdom called *Scotland*, except in the cases hereinbefore specially mentioned.

ACT

To amend an Act of the Second Year of His present Majesty, for the Uniformity of Process in Personal Actions, in His Majesty's Courts of Law at Westminster.

(3 & 4 W. IV. c. 67.)

[28TH AUGUST, 1833.]

WHEREAS by an act passed in the second year of his Majesty's reign, intituled *An act for Uniformity of process in personal actions, in his majesty's courts of law at Westminster*, it is enacted, that the process in certain actions therein mentioned, shall be according to the form contained in a schedule to the said act annexed, and shall be called a writ of *summons*; and that such writ shall be issued by the officer of the said courts respectively, by whom process serviceable in the county therein mentioned hath been heretofore issued from such court: And whereas, since the commencement of the said act, the writ of *summons*, and other writs mentioned therein, issued into the county of *Middlesex*, have been issued, signed, and sealed by the signer of the bills of *Middlesex* in the King's Bench, whilst such writs, into all other counties and cities, have been issued and signed by a different officer, and have been sealed by the sealer of the writs, under and by virtue of an order of the judges of the said court: And whereas it is expedient that all writs issued into the county of *Middlesex*, from the court of King's Bench, should be signed and sealed by the same persons, and in like manner, as all other writs issued from the said court, into other counties and cities: Be it therefore enacted, by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that so much of the said act, passed in the second year of his majesty's reign, as provides that the writ of *summons* therein mentioned shall be issued by the officer of the said courts respectively, by whom process serviceable in the county therein mentioned hath been heretofore issued from such court, shall be, and the same is hereby repealed; and that, from and after the passing of this act, all writs of *summons*, *distringas*, *capias*, and *detainer*, issued into the county of *Middlesex*,

Preamble.

Part of recited
act repealed.

Writs of sum-
mons, distringas,

&c. issued into Middlesex, to be signed, and fees accounted for, in like manner as writs under recited act.

Ante, 72.

Teste and return of certain writs.

Ante, 152. 156.

from the court of King's Bench, shall be signed, sealed, and issued, and the fees thereon shall be taken and accounted for, by the same person or persons, and in like manner, as all other writs of *summons*, *distringas*, *capias*, or *detainer*, issued from the said court of King's Bench, under and by virtue of the said recited act; any law, custom, or usage to the contrary notwithstanding.

II. And whereas by the existing law, and the practice of the said courts of common law, actions may be brought, and issues proceed to trial and final judgment, in vacation, notwithstanding the cause of action may have arisen subsequent to the then preceding term, and jury process, of [and] writs of execution, are now by law tested in term time only; be it therefore enacted, that from and after the passing of this act, the writ of *venire facias juratores* may be tested on the day on which the same shall be issued, and be made returnable forthwith; and that the writ of *distringas juratores*, or *habeas corpora juratorum*, may be tested, in term or vacation, on a day subsequent to the teste of the writ *venire facias juratores*;

Ante, 177. 183. and that all writs of execution may be tested on the day which the same are issued, and be made returnable immediately after execution thereof: Provided always, that when any trial is to be had at bar, the writ of *venire facias juratores* shall be made returnable as heretofore.

APPENDIX.

PART II.

GENERAL RULES

*Agreed upon by the Judges of all the Courts, in
pursuance of the Statute 2 W. IV. c. 39. § 14.*

MICHAELMAS TERM, 3 W. IV. (1832.)

I. IT IS ORDERED, that every writ of *summons*, *capias*, and *detainer*, shall contain the names of all the defendants (if more than one,) in the action; and shall not contain the name or names of any defendant, or defendants, in more actions than one.

Joining several
defendants in
one writ.
Ante, 67.

II. IT IS FURTHER ORDERED, that the following fees shall be taken:

Fees allowed for
signing and
sealing writs.
Ante, 73.

For signing all writs for compelling an appearance,
whether of *summons*, *distringas*, *capias*, or *detainer*,
and whether the same shall be the first writ, or an
alias or *pluries* writ, and whether the same shall issue
into the same county as the preceding writ, or into a
different county

£ s. d.
0 2 6

For sealing the same

0 0 7

For entering an appearance for every defendant

0 1 0

Unless an appearance shall be entered for more than
one defendant, by the same attorney, and in that case
for every additional defendant

0 0 4

For entering ap-
pearance..
Ante, 105, 6.

III. IT IS FURTHER ORDERED, that the person serving a writ of *summons* shall, within *three* days at least after such service, indorse on such writ, the day of the week and month of such service; otherwise the plaintiff shall not be at liberty to enter an appearance for the defendant, according to the statute: and every *affidavit*, upon which such an appearance shall be entered, shall mention the day on which such indorsement was made.

Indorsement of
day of service
on writ of *sum-
mons*, when
made, and con-
sequence of not
making it.
Ante, 74.

Of true day of execution, on writ of *capias*.

Ante, 97.

IV. IT IS FURTHER ORDERED, that the sheriff, or other officer or person to whom any writ of *capias* shall be directed, or who shall have the execution and return thereof, shall, within *six* days at the least after the execution thereof, whether by service or arrest, indorse on such writ, the true day of the execution thereof; and in default thereof, shall be liable, in a summary way, to make such compensation for any damage which may result from his neglect, as the court or a judge shall direct.

Amount of debt and costs to be indorsed on writ of *summons*, &c. *Ante*, 71.

V. IT IS FURTHER ORDERED, that the second rule of *Hilary* term, 1832^a, shall be applicable to all writs of *summons*, *distringas*, *capias*, and *detainer*, issued under the authority of the said act, and to the copy of every such writ.

Alias and *pluries* writs of *summons*, and *capias*, into another county. *Ante*, 77. 98.

VI. IT IS FURTHER ORDERED, that any *alias* or *pluries* writ of *summons* may, if the plaintiff shall think it desirable, be issued into another county; and any *alias* or *pluries* writ of *capias* may be directed to the sheriff of any other county; the plaintiff in such case, upon the *alias* or *pluries* writ of *summons*, describing the defendant as *late* of the place of which he was described in the first writ of *summons*; and upon the *alias* or *pluries* writ of *capias*, referring to the preceding writ or writs, as directed to the sheriff to whom they were in fact directed.

Forms of. *Ante*, 77. 98.

VII. IT IS FURTHER ORDERED, that the *alias* or *pluries* writ of *summons*, into another county, shall be in the following form:

William the Fourth, &c. (*For this form, see* Append. Part III. Chap. IV, &c. § 14.)

And that the *alias* and *pluries* writ of *capias* shall be in the following form:

William the Fourth, &c. (*For this form, see* Append. Part III. Chap. VII, &c. § 15.)

No additional fee for *non omittas* clause, in *distringas*. *Ante*, 82.

VIII. IT IS FURTHER ORDERED, that in every writ of *distringas*, issued under the authority of the said act, a *non omittas* clause may

^a By this rule it is ordered, "that upon every bailable writ and warrant, and upon the copy of any process served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ or process, arrest, or copy and service, and attendance to receive debt and costs; and that, upon payment thereof, within *four* days, to the plaintiff or his attorney, further proceed-

ings will be stayed: but the defendant shall be at liberty, notwithstanding such payment, to have the costs taxed; and if more than one *sixth* shall be disallowed, the plaintiff's attorney shall pay the costs of taxation." For observations on this rule, see 2d Supplement to Tidd *Prac.* 9 Ed. 15. and *Ryley v. Boissomas*, 1 Dowl. Rep. 383. 4 Leg. Obs. 26. S. C. per Taunton, J.

be introduced by the plaintiff, without the payment of any additional fee on that account.

IX. IT IS FURTHER ORDERED, that when the attorney actually suing out any writ, shall sue out the same as agent for an attorney in the country, the name and place of abode of such attorney in the country shall also be indorsed upon the said writ.

Indorsement of attorney's name and place of abode, on writ sued out by agent.

X. IT IS FURTHER ORDERED, that if the plaintiff, or his attorney, shall omit to insert in, or indorse on any writ, or copy thereof, any of the matters required by the said act to be by him inserted therein, or indorsed thereon, such writ, or copy thereof, shall not on that account be held void; but may be set aside as irregular, upon application to be made to the court out of which the same shall issue, or to any judge.

Ante, 69.

Consequence of omitting requisite insertions, or indorsements, on writ, or copy.

Ante, 71.

XI. IT IS FURTHER ORDERED, that upon all writs of *capias*, where the defendant shall not be in actual custody, the plaintiff, at the expiration of *eight* days after the execution of the writ, inclusive of the day of such execution, shall be at liberty to declare *de bene esse*, in case special bail shall not have been perfected: And if there be several defendants, and one or more of them shall have been served only, and not arrested, and the defendant or defendants so served shall not have entered a common appearance, the plaintiff shall be at liberty to enter a common appearance for him or them, and declare against him or them *in chief*, and *de bene esse* against the defendant or defendants who shall have been arrested, and shall not have perfected special bail.

Declaring *de bene esse*, on bailable process.

Ante, 123, 4.

XII. IT IS FURTHER ORDERED, that in case the time for pleading to any declaration, or for answering any pleading, shall not have expired before the *tenth* day of *August* in any year, the party called upon to plead, reply, &c. shall have the same number of days for that purpose, after the *twenty-fourth* day of *October*, as if the declaration, or preceding pleading, had been delivered or filed on the *twenty-fourth* day of *October*; but in such cases, it shall not be necessary to have a second rule to plead, reply, &c.

Consequence of time for pleading, &c. not expiring before 10th *August*.

Ante, 101.

XIII. IT IS FURTHER ORDERED, that in case a judge shall have made an order in vacation, for the return of any writ issued by authority of the said act, or any writ of *capias ad satisfaciendum*, *feri facias*, or *elegit*, on any day in vacation, and such order shall have been duly served, but obedience shall not have been paid thereto, and the same shall have been made a rule of court in the term then next following, it shall not be necessary to serve such rule of court, or make any fresh demand of performance

Attachment for disobedience of order to return writ, when made in vacation.

Ante, 109.

thereon; but an attachment shall issue forthwith, for disobedience of such order, whether the thing required by such order shall, or shall not have been done in the mean time.

Proceedings to be stayed, on attorney's declaring that writ was issued without his authority.

Ante, 70. 105.

Mode of entitling declaration.

Ante, 121, 2. 150, 51. 196.

Pledges discontinued.

Ante, 122. 150.

Direction of writs of *capias*, and *distringas*, into county palatine.

Ante, 61, 2. 90.

XIV. IT IS FURTHER ORDERED, that if any attorney shall, as required by the said act, declare that any writ of *summons*, or writ of *capias*, upon which his name is indorsed, was not issued by him, or with his authority or privity, all proceedings on the same shall be stayed, until further order.

XV. IT IS FURTHER ORDERED, that every declaration shall in future be entitled in the proper court, and of the day of the month and year on which it is filed or delivered; and shall commence as follows: (*The commencements of declarations, here referred to, will be found in the Appendix, Part III. Chap. XVII. §§ 6, 7, 8, 9.*)

And the entry of *pledges* to prosecute, at the conclusion of the declaration, shall in future be discontinued^a.

XVI. IT IS ORDERED, that the writ of *capias*, and *distringas*, which shall hereafter be issued out of the superior courts of law at *Westminster*, into the counties palatine of *Lancaster* or *Durham*, shall be directed to the Chancellor of the county palatine of *Lancaster*, or his deputy there, or to the Bishop of *Durham*, or his chancellor there; and shall be in the following form: (*For the form of the writ of distringas, into the county palatine of Lancaster or Durham, see Append. Part III. Chap. IV, &c. § 21; and for the notice to be subscribed thereto, id. § 22: and for the form of the writ of capias into those counties, see id. Chap. VII. &c. § 3.; and for the memorandum to be subscribed thereto, warning to the defendant, and indorsements thereon, id. §§ 4, 5, 6.*^b)

HILARY TERM, 3 W. IV. (1833.)

Judge's order to bring in body, in vacation.

Ante, 110, 11.

IT IS ORDERED, that in case a rule of court, or judge's order, for returning a bailable writ of *capias* shall expire in vacation, and the sheriff, or other officer, having the return of such writ, shall return *cepi corpus* thereon, a judge's order may thereupon issue, requiring the sheriff, or other officer, within the like number of days after the service of such order, as by the practice of the court is prescribed, with respect to rules to bring in the body issued in term, to bring the defendant into court, by forthwith

^a The foregoing rules were signed by all the judges, including the late Lord *Tenterden*.

^b The latter rule was signed by all the judges, except the late Lord *Tenterden*.

putting in and perfecting bail above to the action: And if the sheriff, or other officer, shall not duly obey such order, and the same shall have been made a rule of court in the term next following, it shall not be necessary to serve such rule of court, or to make any fresh demand thereon; but an attachment shall issue forthwith, for disobedience of such order, whether the bail shall or shall not have been put in and perfected in the meantime.

TRINITY TERM, 3 W. IV. (1833.)

I. IT IS DECLARED AND ORDERED, that in all cases in which a defendant shall have been, or shall be detained in prison, on any writ of *capias*, or *detainer*, under the statute 2 W. IV. c. 39, or, being arrested thereon, shall go to prison for want of bail, and in all cases in which he shall have been, or shall be rendered to prison before declaration, on any such process, the plaintiff in such process shall declare against such defendant, before the end of the next term after such arrest or detainer, or render and notice thereof; otherwise such defendant shall be entitled to be discharged from such arrest or detainer, upon entering an appearance according to the form set forth in the aforesaid statute 2 W. IV. c. 39. Sched. No. 2, unless further time to declare shall have been given to such plaintiff, by rule of court, or order of a judge.

Time for declaring against prisoners.

Ante, 113.

II. IT IS ORDERED, that from the present day, in all actions against prisoners in the custody of the marshal of the *Marshalsea*, or of the warden of the *Fleet*, or of the sheriff, the defendant shall plead to the declaration at the same time, in the same manner, and under the same rules, as in actions against defendants who are not in custody.

Time for pleading to declarations against prisoners.

Ante, 116, 17.

III. IT IS ORDERED, that from and after the *tenth* day of *July* next, where the plaintiff proceeds by action of *debt* on the recognizance of bail, in any of the courts at *Westminster*, the bail shall be at liberty to render their principal, at any time within the space of *fourteen* days next after the service of the process upon them, but not at any later period; and that upon such render being duly made, and notice thereof given, the proceedings shall be stayed, upon payment of the costs of the writ, and service thereof only.

Time to render principal, when plaintiff proceeds by action of debt on recognizance of bail.

Tidd Prac. 9
Ed. 283, 4.

The following rule was agreed upon by the judges of the court of King's Bench, in pursuance of stat. 2 W. IV. c. 39. § 18. and took effect on the first day of *Michaelmas* Term, 1832.

R. Mich. 3 W.
IV. K.B.

By what officers writs of summons, &c. shall be issued, signed, and sealed, in K. B.

Ante, 72.

IT IS ORDERED, that all writs of *summons*, *distringas*, *capias*, and *detainer*, issued in the county of *Middlesex*, shall be issued, signed, and sealed, by the signer of the bills of *Middlesex*; and that all such writs, issued in any other county, shall be issued and signed by the signer of the writs, in the King's Bench office, and sealed by the sealer of the writs, until further order.

APPENDIX.

PART III.

PRACTICAL FORMS.

CHAP. I.

ENTRIES of MESNE PROCESS, to save the STATUTE of LIMITATIONS.

(§ 1.)
Entry of writ of summons, with return of *non est inventus*, by the plaintiff or his attorney, and award of *alias*, to save the statute of limitations, in K. B.

Ante, 51. 77.

As yet of — term, (*the term in, or as of, which the writ of summons was sued out,*) in the — year of the reign of King *William the Fourth*. Witness Sir *Thomas Denman*, Knight.

Ellenborough.

Return of *non est inventus*.

Award of *alias*.

England, (to wit.) Our lord the king sent to *C. D.* of —, in the county of —, his writ close in these words, that is to say: *William the Fourth*, &c. (*here copy the writ of summons verbatim, to the end, as in p. 262, 3, and proceed as follows:*) And afterwards, and within *one* calendar month next after the expiration of the said writ, including the day of such expiration, to wit, on the — day of — 18—, the said *A. B.* by *E. F.* of — his attorney, (*or, if the writ was issued by the plaintiff in person*, “the said *A. B.* in his proper person”), by whom the said writ was issued, returned, that the said *C. D.* was not found in the said county of —, or within two hundred yards of the border thereof; and the said *C. D.* has not appeared to the said action, according to the exigency of the said writ: Therefore, by another writ of

our said lord the king, issued by the said *E. F.* (*or, A. B.*) in continuation of the said first mentioned writ, within *one* such calendar month next after the expiration thereof, to wit, on the — day of — 18—, the said *C. D.* is commanded, as before he was commanded, that within *eight* days after the service of the said writ secondly mentioned on him, inclusive of the day of such service, he do cause an appearance to be entered for him, in his Majesty's court of King's Bench, (&c.) in an action on promises, (*or, of debt, &c. as the case may be,*) at the suit of the said *A. B.* And the said *C. D.*, as before, is required to take notice, that in default of his so doing, the said plaintiff may cause an appearance to be entered for him, and proceed therein to judgment and execution; and which said last mentioned writ doth contain a *memorandum*, indorsed thereon, (*or, subscribed thereto,*) specifying the day of the date of the said first mentioned writ, &c.

— (to wit.) *C. D.* of —, in the county of —, was, by his Majesty's writ of *summons*, directed to the said *C. D.* and dated the — day of —, in the — year of the reign of his said Majesty, commanded, that within *eight* days after the service of that writ on him, inclusive of the day of such service, he should cause an appearance to be entered for him, in his said Majesty's court of Common Pleas, in an action on promises, (*or, of debt, &c. as in the writ,*) at the suit of *A. B.*; and was thereby required to take notice, that in default of his so doing, the said *A. B.* might cause an appearance to be entered for him, and proceed therein to judgment and execution. And afterwards, and within *one* calendar month next after the expiration of the said writ, &c. (*as in the last, to the end, substituting "Common Pleas," for "King's Bench."*)

(§ 1. a.)
The like, in
C. P.
Ante, 51. 77.

Pleas before the Barons of the Exchequer at *Westminster*, among the pleas of the term of —, (*the term in, or as of, which the writ of summons was sued out,*) in the — year of the reign of our sovereign lord *William* the Fourth, by the grace of God, of the united kingdom of *Great Britain* and *Ireland* king, defender of the faith, and in the year of our Lord 18—.

(§ 1. b.)
The like, in Ex-
chequer.
Ante, 51. 77.

— (to wit.) *C. D.* of —, in the county of —, was, by his Majesty's writ of *summons*, &c. (*as in last, substituting "Exchequer of Pleas," for "Common Pleas."*)

(§ 1. c.)
The like, and
award of *dis-*
tringas, to save
the statute, in
K. B.^a
Ante, 51. 77.

(*As in § 1, to the defendant's non-appearance, on the return of non est inventus to the writ of summons, and then as follows:*)
Therefore, by another writ of our said lord the king of *distringas*, issued by the said *E. F.* (*or, A. B.*) in continuation of the said first mentioned writ, within *one* such calendar month next after the expiration thereof, to wit, on the — day of — 18—, the sheriff of — is commanded, that he omit not by reason of any liberty in his bailiwick, but that he enter the same, and distrain upon the goods and chattels of the said *C. D.* for the sum of 40*s.* in order to compel his appearance, in his said majesty's court of King's Bench, (&c.) to answer the said *A. B.* in a plea of trespass on the case, (*or, debt, &c. as the case may be;*) and how the said sheriff shall execute that writ, he make known to our said lord the king, (*or, to the justices of our said lord the king, or the barons of his majesty's Exchequer,*) in his said court, the — day of —, next ensuing: the same day is given to the parties aforesaid, at the same place. At which day, before our said lord the king (in *K. B.*; *or, in the Exchequer*, before the barons of the said Exchequer) at *Westminster*, comes (*or, in C. P.*, "At which day comes here,") the said *A. B.* by the said *E. F.* his attorney, (*or, in his proper person,*) and offers himself against the said *C. D.* in the plea aforesaid; and the sheriff, to wit, —, sheriff of — aforesaid, now here returns, that the said *C. D.* is not found in his bailiwick, and that the said *C. D.* hath nothing therein, by which he can be distrained; and the said *C. D.* doth not come, &c.

(§ 2.)
Entry of writ
of *capias*, with
sheriff's return
of *non est in-*
ventus, and
award of *alias*
capias, in K. B.^a
Ante, 51. 77.
Return of *non*
est inventus.
Award of *alias*.

As yet of — term, &c. (§ 1).

England, (to wit). Our lord the king sent to his sheriff of —, his writ close in these words, that is to say: *William* the Fourth, &c. (*here copy the writ of capias, verbatim, to the end, as in p. 272*). And afterwards, and within *one* calendar month next after the expiration of the said writ, including the day of such expiration, to wit, on the — day of — 18—, the sheriff, to wit, —, sheriff of — aforesaid, returned, that the said *C. D.* was not found in his bailiwick; and the said *C. D.* did not come: Therefore, by another writ of our said lord the king, issued by the said *E. F.* (*or, A. B.*) in continuation of the said first mentioned writ,

^a The differences between this entry Exchequer, are the same as between the
in K. B. and similar entries in C. P. and entries in § 1. and §§ 1. a. and 1. b.

within *one* such calendar month next after the expiration thereof, to wit, on the — day of — 18—, the said sheriff is commanded, as before he was commanded, that he omit not, &c. (*as in the writ of capias*, p. 272.) and which said last mentioned writ did contain a *memorandum*, indorsed thereon, (*or*, subscribed thereto,) specifying the day of the date of the said first mentioned writ, &c.

CHAP. I.

CHAP. III.

NOTICE of APPLICATION, and AFFIDAVITS, &c. for ADMISSION of ATTORNIES.

Notice is hereby given, that *E. D.* of —, now (*or* lately) under articles of clerkship to *A. B.* of —, attorney at law, (*adding, if the articles have been assigned*, “and which articles were afterwards assigned to *E. F.* of —, attorney at law,”) intends to apply next — term, to be admitted an attorney of his majesty's court of King's Bench, (*or* Common Pleas, *or* Exchequer of Pleas.) Dated this — day of — 18—.

(§ 1.)
Notice of intention to apply for admission, as an attorney^a.
Tidd *Prac.*
9 Ed. 69, 70.

E. D.

In the King's Bench.

E. D. of —, in the county of —, gentleman, maketh oath and saith, that in pursuance of the articles of clerkship hereto annexed^c, bearing date the — day of — 18—, he hath really and truly served, and was employed by *A. B.* of —, in the

(§ 2.)
Affidavit of service under articles, and of affixing notices, &c. when made by the clerk, in K. B.^b.
To be engrossed on a half-crown stamp.

^a Some of the forms of *affidavits*, &c. in the Appendix to the *ninth* Edition of Tidd's *Practice*, Chap. III. which relate to the admission of attorneys, not exactly corresponding with the forms, as settled by the judges of the King's Bench, it has been thought right, in the present Chapter, to insert a set of forms, as so settled, in that court, and also the forms to be used in the Common Pleas, and Exchequer.

^b This, and the two following forms, and those in § 5, 6, were settled by the

judges of the court of King's Bench.

^c For the form of articles of clerkship to an attorney and solicitor, see Append. to Tidd *Prac.* 9 Ed. Chap. III. § 1; and for an *affidavit* of the execution of such articles, in general, *id.* § 2; and where the clerk has taken a degree at the university, *id.* § 3. And as to the qualification, admission, enrolment, and certificates of attorneys, and their consequent privileges, disabilities, and duties, &c. see Tidd *Prac.* 9 Ed. 60, &c.

CHAP. III. county of —, gentleman, one of the attornies of his majesty's court of — at *Westminster*, as his clerk, in the practice of an attorney and solicitor, from the day of the date of the said articles inclusive, to the — day of — 18— inclusive, being the full term of five years. And this deponent further saith, that he did, before the commencement of — term now last past, affix a notice in writing, containing the name and then place of abode of this deponent, and the name and then place of abode of the said *A. B.* the master of this deponent, in the King's Bench office, and on the outside of the court of King's Bench in *Westminster Hall*, in the places where the like notices are usually affixed, purporting that this deponent intended to apply, in the then next — term, to be admitted an attorney of his majesty's court of King's Bench at *Westminster*, as by a rule of the said court is in that behalf required; and that he did also, before the commencement of the said — term, enter a like notice, in the book kept for that purpose, at the chambers of each of the judges of the said court. And this deponent further saith, that if the said notices, or any or either of them, were or was afterwards removed, cancelled, or defaced, it was done without the privity or consent of this deponent.

Sworn, (&c.)

E. D.

(§ 3.)
The like, when
made by the
clerk, and an-
other person.

Tidd *Prac.*
9 Ed. 69, 70.

In the King's Bench.

E. D. of — in the county of —, gentleman, and *G. H.* clerk to *I. K.* of —, gentleman, severally make oath and say; and first this deponent *E. D.* for himself saith, that in pursuance of the articles of clerkship hereto annexed, bearing date, (&c.) he hath really and truly served, &c. (*as in last.*) And this deponent *G. H.* for himself saith, that he did, before the commencement of — term now last past, affix a notice in writing, containing the name and then place of abode of the said *E. D.* and the name and then place of abode of the said *A. B.* the master of the said *E. D.* in the King's Bench office, and on the outside of the court of King's Bench in *Westminster Hall*, in the places where the like notices are usually affixed, purporting that the said *E. D.* intended to apply, in the then next — term, to be admitted an attorney of his majesty's court of King's Bench at *Westminster*, as by a rule of the said court is in that behalf required; and that he this deponent did also, before the commencement of the said — term, enter a like notice, in the book kept for that purpose, at the chambers of each of the judges of the said court. And this de-

ponent *E. D.* for himself further saith, that if the said notices, or CHAP. III.
any or either of them, were or was afterwards removed, cancelled,
or defaced, it was done without the privity or consent of this de-
ponent.

Sworn, (&c.)

E. D.

G. H.

In the King's Bench.

E. D. of —, in the county of —, gentleman, and *G. H.* clerk to *I. K.* of —, gentleman, severally make oath and say; and first, this deponent *E. D.* for himself saith, that in pursuance of the articles of clerkship hereto annexed, bearing date, (&c.) he hath really and truly served, and was employed by *A. B.* of —, in the county of —, one of the attornies of his majesty's court of — at *Westminster*, as his clerk, in the practice of an attorney and solicitor, from the day of the date of the said articles inclusive, to the — day of — 18— inclusive, being a period of — years, — calendar months, and — days; and that in pursuance of an indenture of assignment of the said articles, also hereto annexed, bearing date, (&c.) he this deponent hath really and truly served, and was employed by *L. M.* of —, in the county of —, in the said assignment mentioned, one other of the attornies of his said majesty's court of — at *Westminster*, as his clerk, in the practice of an attorney and solicitor, from the day of the date of the said assignment inclusive, to the — day of — 18— inclusive, being a period of — years, — calendar months, and — days, making in the whole the full term of five years. And this deponent *G. H.* for himself saith, that he did, before the commencement of — term now last past, affix a notice in writing, containing the name and then place of abode of the said *E. D.* and the names and places of abode as well of the said *A. B.* as of the said *L. M.* the respective masters of the said *E. D.*, in the King's Bench office, &c. (*as in the last, to the end.*)

E. D.

G. H.

In the King's Bench.

E. D. of —, gentleman, maketh oath and saith, that in pursuance of the articles of clerkship hereto annexed, bearing date the — day of — 18—, he hath really and truly served, and was employed by *A. B.* of —, in the county of —, one of the attornies of his majesty's court of King's Bench at *Westminster*,

(§ 4.)
The like, when
the service was
under articles of
clerkship, and
assignment.
Tidd *Prac.* 9
Ed. 69, 70.

(§ 5.)
The like, where
the clerk served
part of his time
as pupil to a
barrister, or
special pleader.
Tidd *Prac.* 9
Ed. 69.

CHAP. III.

as his clerk, in the practice of an attorney and solicitor, from the day of the date of the said articles, to the — day of — 18— inclusive, being a period of — years, — months, and — days: And further saith that, by virtue and under the authority of an act of parliament made and passed in the first and second years of the reign of his late majesty king *George* the Fourth, intituled “An act to amend the several acts for the regulation of attornies,” he this deponent actually and really was and continued with, and was actually and really employed by *I. K.* of —, in the county of —, Esquire, as his pupil, from the — day of — 18—, to the — day of — 18— inclusive, being a period of —; and that the said *I. K.* during the term of such last-mentioned service, was a person *bond fide* practising as a barrister, (*or*, a certificated special pleader) in *England*; and which said services in the whole amount to the full term of *five* years. And this deponent further saith, that he did, before the commencement of — term now last past, affix a notice, &c. (*as in § 2.*)

(§ 6.)
Affidavit to be
made by the
barrister, or
special pleader.
Tidd Prac. 9
Ed. 69.

In the King's Bench.

I. K. of —, Esquire, maketh oath and saith, that *E. D.* of —, actually and really was and continued with, and was actually and really employed by this deponent, as his pupil, from the — day of — 18— to the — day of — 18— inclusive: And this deponent further saith, that during the whole of such period, he this deponent was a practising barrister in *England*, (*or* was actually and *bond fide* practising as a certificated special pleader in *England*, *as the case may be.*)

Sworn, (&c.)

I. K.

(§ 7.)
Affidavit of the
payment of
stamp duty on
articles.
To be en-
grossed on a
separate stamp.
Tidd Prac. 9
Ed. 70.

In the King's Bench.

E. D. of —, in the county of —, gentleman, maketh oath and saith, that the stamp duty of *one hundred and twenty pounds* was paid in respect of certain articles of clerkship, bearing date the — day of — 18—, and made between *A. B.* of —, in the county of —, gentleman, one of the attornies of his majesty's court of — at *Westminster*, of the one part, and *C. D.* of —, in the county of —, gentleman, and this deponent, of the other part, as appears by the stamp impressed thereon; and that the said articles were duly executed by the respective parties thereto, on the day of the date thereof, and were duly registered

on the — day of — 18—, as appears by the certificate of the proper officer indorsed thereon. CHAP. III.

Sworn, (&c.)

E. D.

In the King's Bench.

(*As in the last, with the following addition:*) And this deponent *E. D.* further saith, that the stamp duty of *one pound fifteen shillings* was paid in respect of a certain assignment of the said articles, bearing date the — day of — 18—, and made between the said *A. B.* of the first part, the said *C. D.* and this deponent of the second part, and *L. M.* of —, in the county of —, gentleman, one of the attornies of his majesty's court of — at *Westminster*, of the third part, as appears by the stamp impressed thereon; and that the said assignment was duly executed, by the respective parties thereto, on the day of the date thereof, and was duly registered on the — day of — 18—, as appears by the certificate of the proper officer indorsed thereon.

(§ 8.)
The like, where
the articles had
been assigned.
Tidd *Prac.* 9
Ed. 70.

Sworn, (&c.)

E. D.

(*As in § 7, with the following addition:*) And this deponent further saith, that he was, on the — day of — 18—, admitted a solicitor of his majesty's high court of Chancery (*or*, "an attorney of his majesty's court of Common Pleas," *or* "Exchequer of Pleas," and that he still continues to be such solicitor (*or*, "attorney.")

(§ 9.)
The like, where
the party has
been admitted in
Chancery, or in
C. P. or Ex-
chequer.
Tidd *Prac.* 9
Ed. 72, 3.

Sworn, (&c.)

E. D.

I do hereby certify, that the within named *E. D.* hath well and truly served me, for the term of *five* years, pursuant to these articles; and that he is a respectable person, and fit and proper to be admitted an attorney of his majesty's court of King's Bench at *Westminster*. Dated, &c. (§ 1.)

(§ 10.)
Certificate of
service.
To be written
on articles.

A. B.

Let *E. D.* of —, gentleman, be sworn, admitted, and enrolled, an attorney of his majesty's court of King's Bench at *Westminster*. Dated, &c. (§ 1.)

(§ 11.)
Fiat for admis-
sion.

Articles dated — day

— (*Judge's name.*)

of —, 18—.

To *Thomas Le Blanc*, Esquire,

&c. &c. &c.

(§ 12.)
Oath, or affirm-
ation, on admis-
sion.
Tidd *Prac.* 9
Ed. 70.

I, *E. D.* do swear, (*or, if a Quaker, "do affirm,"*) that I will truly and honestly demean myself in the practice of an attorney, according to the best of my knowledge and ability. So help me God.

E. D.

(§ 13.)
Form of admis-
sion, in K. B.
Tidd *Prac.* 9
Ed. 71.

In the King's Bench.

— the — day of —, in the — year of King
William the Fourth.

It appearing unto this court, that *E. D.* of —, gentleman, is duly qualified to act as an attorney of his majesty's court of King's Bench at *Westminster*; and he having this day taken, in open court, the oaths of allegiance and supremacy, (*or, if a Roman Catholic, "the oaths appointed to be taken, instead of the oaths of allegiance and supremacy,"*) and also taken and subscribed the oaths to be taken by attornies, by an act of parliament, made and passed in the second year of the reign of his late majesty king *George* the second, intituled, 'An act for the better regulation of attornies and solicitors;' this court doth hereby admit him an attorney of his said majesty's court of King's Bench, and order his admission to be enrolled by the proper officer of the said court, pursuant to the direction of the said act. Dated this — day of — 18—.

Enrolled the same day.

By the Court.

T. Le Blanc.

(§ 14.)
Affidavit of ser-
vice under ar-
ticles, and of
affixing notices,
&c. in C. P.
Tidd *Prac.* 9
Ed. 69, 70.

In the Common Pleas.

E. D. of —, in the county of —, gentleman, maketh oath and saith, that in pursuance of the articles of clerkship hereto annexed, bearing date, (&c.) he hath really and truly served, &c. (*as in § 2.*) And this deponent further saith, that he did, before the commencement of — term now last past, affix a notice, written in legible characters, and containing the name and then place of abode of this deponent, and also the name and then place of abode of the said *A. B.* to whom this deponent was so articulated, and with whom he served his clerkship as aforesaid, on the outside of the court of Common Pleas, in the place where public notices are usually affixed, and also in the Common Pleas office, purporting that this deponent intended to apply, in the then next — term, to be admitted an attorney of his said Majesty's court of Common Pleas at *Westminster*, as by a rule of the said court is in that behalf required; and that he this deponent did also, before

the commencement of the said — term, leave a like notice at the chambers of each of the judges of the said court of Common Pleas, and which was there fixed up in a conspicuous place, according to the said rule. And this deponent further saith, that if the said notices, or any or either of them, were or was afterwards removed, cancelled, or defaced, it was done without the privity or consent of this deponent^a.

Sworn, (&c.)

E. D.

In the Exchequer of Pleas.

E. D. of —, gentleman, maketh oath and saith, that he hath actually served, and been employed by *A. B.* of —, gentleman, as his clerk, in the practice of an attorney, during the whole of the term of *five* years, pursuant to the articles hereto annexed. And this deponent further saith, that he did cause his name and place of abode, and the name and place of abode of the said *A. B.* to whom this deponent was articulated as aforesaid, written in legible characters, to be affixed in the court of Exchequer, *Westminster Hall*, in the place where such notices are usually affixed, and also in the Exchequer office of Pleas, *Lincoln's Inn*, during the whole of the last — term, (*the term preceding that in which the clerk is to be admitted;*) and that he this deponent did also, on the — day of — last, being one full term before the term of admission, cause his name and place of abode, and the name and place of abode of the said *A. B.*, to be entered in the book kept for that purpose, at the chambers of each of the barons of the said court of Exchequer^a.

Sworn, (&c.)

E. D.

In the Exchequer of Pleas.

E. D. of —, gentleman, maketh oath and saith, that the stamp duty of 120*l.* was paid on certain articles of clerkship, bearing date the — day of — 18—, and made between *A. B.* of —, in the county of —, gentleman, one of the attornies of his majesty's court of — at *Westminster*, of the one part, and *C. D.*

^a When the *affidavit* of service, and of affixing notices, &c. is made by different persons, or the articles have been assigned, or the clerk has served part of his time with a barrister or special pleader, the form in the Common Pleas, or Exchequer, will vary as in the King's Bench, for which *vide ante*, § 3, 4, 5, 6.; and the subsequent sections may be easily ap-

plied to the two latter courts.

^b As to the admissibility of attornies of the court of King's Bench and Common Pleas, &c. to practise in the court of Exchequer, see stat. 11 Geo. IV. & 1 W. IV. c. 70. § 10. 16. 1 Sup. to Tidd *Prac.* 9 Ed. 54, 5, 6. 65. And for the mode of admitting them, see Dax Excheq. Pr. 2 Ed. 21, 2.

(§ 15.)
The like, in Exchequer^b.
Dax Excheq. Append. 2 Ed. lxxxviii.

(§ 16.)
Affidavit for admission of attorney of K. B. or C. P. in Exchequer of Pleas.
Dax Excheq. Append. 2 Ed. lxxxiii.

of —, in the county of —, gentleman, and this deponent, of the other part; and which said articles were executed on the — day of — 18—, and duly enrolled in the same court, on the — day of — 18—, as appears by the certificate of the proper officer. And this deponent further saith, that he was duly admitted an attorney of his said majesty's court of — at *Westminster*, on the — day of — 18—, and still continues on the roll of attorneys of the said court^a.

Sworn, (&c.)

E. D.

^a For the mode of admitting an attorney of K. B. or C. P., in the Exchequer, on the above *affidavit*, see *Dax Excheq. Pr.* 2 Ed. 18, 19.

CHAP. IV, V, VI. IX.

WRITS of SUMMONS, and DISTRINGAS; and PROCEEDINGS thereon.

(§ 1.)
Præcipe for writ
of summons.
Ante, 72, 3.

— (the county into which the writ is to be issued.) Writ of summons, for *A. B.* against *C. D.*^a of —, in the said county, in an action on promises, (or “of debt”, &c. as the case may be).

E. F. of —, plaintiff's attorney, (or agent;)
or, if the plaintiff sue in person,

A. B. of —, plaintiff.

—18—. (date of issuing writ).

(§ 2.)
Writ of sum-
mons.
Ante, 65. 67.
103.

William the Fourth, by the grace of God, of the united kingdom of *Great Britain and Ireland* king, defender of the faith: To *C. D.* of —, in the county of —, greeting: We command you, that

^a If the defendant be a *peer*, he should be described by his name of dignity, as “the Right Honourable *C. D.* Duke, Marquis, or Earl of —”, (&c.) And it is usual, in an action against a *peer*, or member of the House of Commons, to describe the former as having privilege of *peerage*, and the latter as having privilege of *parliament*; but this does not

seem to be necessary. *Ante*, 66. If the action be brought against a *corporation* aggregate, they must be described by their *corporate* name; as, in *London*, “the mayor, commonalty, and citizens of the city of *London* :” and, when *hundredors* are sued, they must be described as “men inhabiting within the hundred of —, in the county of —.”

within *eight* days after the service of this writ on you, inclusive CH. IV, &c.
of the day of such service, you do cause an appearance to be entered for you, in the court of King's Bench, (Common Pleas, or Exchequer of Pleas,) in an action on promises, (or, of debt, &c. *as the case may be,*) at the suit of *A. B.* And take notice, that in *Ante*, 76.
default of your so doing, the said *A. B.* may cause an appearance to be entered for you, and proceed therein to judgment and execution. Witness Sir *Thomas Denman* knight, (in *K. B.*; or, in *C. P.* "Sir *Nicolas Conyngham Tindal* knight," or, in the *Exchequer*, "John *Singleton*, Lord *Lyndhurst*,") at *Westminster*, the — day of —, in the — year of our reign.

N. B. This writ is to be served within *four* calendar months from the date thereof, including the day of such date, and not afterwards. (§ 3.)
Memorandum
to be subscribed
thereto.

Ante, 69.

This writ was issued by *E. F.* of —, attorney for the said *A. B.* Or, (if no attorney be employed,) "This writ was issued in person by *A. B.* who resides at —," (mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house, of the plaintiff's residence, if any such). (§ 4.)
Indorsement to
be made thereon,
before service.

Ante, 69.

The plaintiff claims —*l.* for debt, and —*l.* for costs; and if the amount thereof be paid to the plaintiff, or his attorney, within four days from the service hereof, further proceedings will be stayed. (§ 5.)
Statement of
plaintiff's claim,
for debt and
costs.

Ante, 70, 71.

This writ was served by me *X. Y.* on *C. D.* (the defendant,) on — the — day of —, 18—. (§ 6.)
Indorsement to
be made on writ,
after service.

X. Y.

Ante, 74.

— (County.) Writ of *summons*, for *A. B.* against *C. D.* of —, in the said county, Esquire, (having privilege of parliament,) for —*l.* in an action on promises, &c. (as in § 1.) (§ 7, 8.)
Præcipe for, and
writ of *summons*,
against member
of parliament, to
enforce provi-
sions of stat. 6
Geo. IV. c. 16.

William the Fourth, &c. (§ 2.) To *C. D.* of —, Esquire, having privilege of parliament, greeting: We command you, that within *one* calendar month next after personal service hereof on you, you do cause an appearance to be entered for you, in our court of King's Bench, (Common Pleas, or Exchequer of Pleas,) in § 10.
Ante, 67, 75, 6.

CH. IV, &c. an action on promises, (*or, of debt, &c. as the case may be,*) at the suit of *A. B.*: And you are hereby informed, that an *affidavit* of debt for the sum of — *l.* hath been filed in the proper office, according to the provisions of a certain act of parliament, made and passed in the sixth year of the reign of his late Majesty king *George* the Fourth, intituled "An Act to amend the Laws relating to Bankrupts"; and that unless you pay, secure, or compound for the debt sought to be recovered in this action, or enter into such bond as by the said act is provided, and cause an appearance to be entered for you, within *one* calendar month next after such service hereof, you will be deemed to have committed an act of bankruptcy, from the time of the service hereof. Witness, &c. (§ 2.)

(§ 9, 10.)
Memorandum
to be subscribed
thereto; and di-
rection for in-
dorsement
thereon.

Ante, 69. 75, 6.

N. B. This writ is to be served within *four* calendar months from the date thereof, including the day of such date, and not afterwards.

This summons is to be indorsed with the name of the plaintiff, or his attorney, in like manner as the writ of *summons*, (*ante*, § 2.) or *capias*, (*post*, § 274.)

(§ 11.)
Return of *non*
est inventus, to
writ of sum-
mons.

Ante, 51. 77.
107.

The within named *C. D.* is not found in the county of —, or within two hundred yards of the border thereof.

E. F. plaintiff's attorney.

Or,

A. B. the above named plaintiff in person,
(*if the writ was so issued.*)

(§ 12.)
Præcipe for an
alias and *pluries*
writ of sum-
mons.

Ante, 77.

(§ 13.)
Alias, and *plu-*
ries writ of sum-
mons.

Ante, 76.

— (County.) *Alias* (or *pluries*) writ of *summons*, for *A. B.* against *C. D.* of —, in the said county, in an action on promises, &c. (*as in* § 1.)

William the Fourth, &c. (§ 2.) To *C. D.* of —, in the county of —, greeting: We command you, as before (*or*, "as often") we have commanded you, that within *eight* days, &c. (*id.*)

(§ 14.)
The like, into
another county.
Ante, 76, 7.

William the Fourth, &c. (§ 2.) To *C. D.* of —, in the county of —, late of —, in the county of —, (*original county.*) We command you, as before (*or*, often) we have commanded you, &c. (*as in* § 2.)

The writ of *summons*, which is continued by this writ, was dated the — day of —, in the — year of the reign of his present Majesty ^a.

(§ 15.)
Memorandum of
date of first
writ.

Ante, 51. 77.

In the King's Bench,
(Common Pleas, *or*
Exchequer of Pleas.)

A. B. plaintiff,
and
C. D. defendant.

(§ 16.)
Affidavit, to ob-
tain writ of *dis-*
tringas.

Ante, 76. 78,
&c.

I. K. of —, clerk to *E. F.* gentleman, attorney for the above-named plaintiff, maketh oath and saith, that having been directed by the said *E. F.* to serve the above-named defendant personally, with a copy of a writ of *summons*, which appeared to this deponent to have been regularly issued out of, and under the seal of this honorable court, on the — day of — instant, (*or last*), against the said defendant, at the suit of the said plaintiff, and a true copy whereof is hereunto annexed, (*annexing a copy of the writ to the affidavit*), to which said writ a memorandum was subscribed, and indorsements were made thereon, pursuant to the statute in such case made and provided, he this deponent did, on the — day of — instant, (*or last*), attend, for the purpose of serving such copy, at the dwelling house (*or place of residence*) of the said defendant, being No. —, in — street, in the parish of —, in the county of —; and, on enquiring after the said defendant, was informed by a person in the said dwelling house, (*or place of residence*), who represented herself (*or himself*) to be, and whom this deponent believes to have been, the wife (*or son, daughter, or servant, &c.*) of the said defendant, that the said defendant was not at home, (&c.): and this deponent then stated to the said wife (*or son, &c.*) of the said defendant, the nature of his business, and informed her (*or him*), that he called to serve the said defendant with a copy of a writ of *summons*, at the suit of the said plaintiff; and that he this deponent would call again for that purpose, at the said dwelling-house (*or place of residence*) of the said defendant, on the — day of — then next, at — of the clock in the forenoon. And this deponent further saith, that he did accordingly attend at the said dwelling-house (*or place of residence*) of the said defendant, for the purpose aforesaid, at — of the clock in the forenoon of the said — day of — in-

^a This memorandum must be indorsed on, or subscribed to every writ, issued in continuation of a preceding one, to save the statute of limitations. *Ante*, 51. 77.

CH. IV, &c. stant, (*or last*;) and then saw the said wife (*or son, &c.*) of the said defendant, who informed this deponent, that, &c. (*stating the substance of what passed, and the answers given to the deponent's enquiries*;) and thereupon this deponent again stated to the said wife (*or son, &c.*) the nature of his business, and informed her (*or him*) that he would call again, for the purpose of seeing the said defendant, and serving him with a copy of the said writ, at his said dwelling-house, (*or place of residence*;) on — the — day of — then next, at — of the clock in the forenoon. And this deponent further saith, that he did accordingly attend at the said dwelling-house (*or place of residence*) of the said defendant, for the purpose aforesaid, at — of the clock in the forenoon of the said — day of — instant, (*or last*;) and then saw the said wife (*or son, &c.*) of the said defendant, who informed this deponent, &c. (*according to the fact*): whereupon this deponent then and there delivered to and left with the said wife (*or son, &c.*) of the said defendant, a true copy of the said writ of *summons*, with the said *memorandum* subscribed thereto, and indorsements thereon, and desired her (*or him*) to give it to the said defendant, as soon as possible. And this deponent further saith, that he hath used all due means in his power, to serve the said defendant with a true copy of the said writ of *summons*; but that he hath not been able to do so; and, for the reasons aforesaid^a, he verily believes that the said defendant keeps out of the way, to avoid personal service thereof. And this deponent further saith, that the said defendant hath not appeared to the said action, according to the exigency of the said writ, and cannot be compelled to do so, without some more efficacious process^b.

Sworn, (&c.)

I. K.

^a If the reasons to be collected from the answers given to the enquiries made after the defendant, are not likely to be sufficient to induce the court to believe that he keeps out of the way to avoid being served, other reasons must be stated, to satisfy the court that this was the case; such as that the defendant was denied to the deponent when at home, &c.

^b The above form will of course vary, according to circumstances: and it will

be observed, that it is in many respects similar to that which was before required by the statutes 51 Geo. III. c. 124. § 2. and 7 & 8 Geo. IV. c. 71. § 5, in cases where the plaintiff proceeded by *original* or other writ, and summons or attachment thereupon, &c. against any person not having privilege of parliament; as to which see Tidd *Prac.* 9 Ed. 113, 14. 155, 6; and for the proceedings on these statutes, see *Append. thereto*, Chap. V. § 14, &c.

[In a country cause, or where the person attempting to serve the defendant with a copy of the writ of *summons*, has not searched for his appearance, it is usual to make a separate *affidavit* of such search, and that no appearance has been entered, as in the next form.]

In the King's Bench, &c. (265.) *A. B.* plaintiff, &c. (*id.*) (\$ 16. a.)
E. F. of —, in the county of —, gentleman, maketh oath Affidavit of search for appearance, and that none is entered.
 and saith, that he did, on the — day of — instant, (*or last*), duly search in the book kept for entering appearances in the King's Bench office, (*in K. B.; or, in C. P. "by the filacer of the county of —;" or, in the Exchequer of Pleas, "in the office of pleas of this honourable court,"*) for the purpose of ascertaining if any appearance had been entered for the defendant in this cause: And this deponent saith, that no appearance hath been entered for the said defendant, as appears by the said book. *Ante*, 78. 80.
 Sworn, (&c.) *E. F.*

In the King's Bench. (\$ 17.)
 — the — day of —, in the — year of king Rule of court thereon, in K. B.
William the Fourth. *Ante*, 78. (c.) 81.
B. } Upon reading the *affidavit* of *I. K.* it is ordered, that a
v. } writ of *distringas* do issue, directed to the sheriff of —, to
D. } compel an appearance, by or on behalf of the defendant, pursuant to the act of parliament in that case made and provided.
 On the motion of Mr. —. By the Court.

In the Common Pleas. (\$ 17. a.)
 — term, in the — year of the reign of king The like, in C. P.
William the Fourth. *Ante*, 78. (c.) 81.
 —, the — day of —, (*the day of the week and month on which the rule is made, as "Saturday, 2d November, &c."*)
B. } Upon reading the *affidavit* of *I. K.* it is ordered, that a
v. } writ of *distringas* do issue, &c. (*as in last*). On the motion
D. } of Mr. Serjeant —. By the Court.

In the Exchequer of Pleas. (\$ 17. b.)
 — term, &c. (*as in last*). The like, in Exchequer.
B. against *D.* *Ante*, 78. (c.) 81.
 —, the — } Upon the motion of Mr. — for the plaintiff,
 day of —. } and reading the *affidavit* of *I. K.* it is ordered,
 that a writ of *distringas* do issue against the said defendant.
 By the Court.

(§ 18.) Judge's order for *distringas*, in vacation. *Ante*, 78. (c.) 81.

B. } Upon reading the *affidavit* of *I. K.* I do order, that a
 v. } writ of *distringas* do issue, &c. (§ 17). Dated the — day
 D. } of — 18—. — Judge's (or Baron's) name.

(§ 19.) *Præcipe* for writ of *distringas*. *Ante*, 81. 84.

— (the county, &c. to the sheriff, &c. of which the writ is directed). Writ of *distringas* for *A. B.* against *C. D.* returnable on —, for non-appearance to writ of *summons*, in plea of trespass on the case, (or debt, &c. as the case may be.)

E. F. &c. (262.)

(§ 20.) Writ of *distringas*. *Ante*, 67. 78. 81.

William the Fourth, &c. (262). To the sheriff of —^a, greeting: We command you, that you omit not by reason of any liberty in your bailiwick, but that you enter the same, and distrain upon the goods and chattels of *C. D.* for the sum of *forty* shillings, in order to compel his appearance, in our court of King's Bench, (Common Pleas, or, Exchequer of Pleas,) to answer *A. B.* in a plea of trespass on the case, (or, debt, &c., as the case may be :) and how you shall execute this our writ, you make known to our said court, on the — day of — now next ensuing. Witness, &c. (263).

(§ 21.) The like, to a county palatine. *Ante*, 81, 2.

William the Fourth, &c. (262). To the chancellor of our county palatine of *Lancaster*, or his deputy there, (or, "To the reverend father in God, *William*, by divine providence, Lord Bishop of *Durham*, or to his chancellor there,") greeting: We command you, that by our writ, under the seal of our said county palatine, to be duly made, and directed to the sheriff of our said county palatine, you command the said sheriff, (or, if in *Durham*, that "by our writ, under the seal of your bishoprick, to be duly made, and directed to the sheriff of the county of *Durham*, you cause the said sheriff to be commanded,") that he omit not by reason of any liberty in his bailiwick, but that he enter the same, and distrain upon the goods and chattels of *C. D.* for the sum of *forty* shillings, in order to compel his appearance, in our court of —, to answer *A. B.* in a plea of trespass on the case, (or, debt, &c. as the case may be ;) and how he shall execute that our writ, he make known to us^b, in our said court, on the — day of — now next ensuing. Witness, &c. (263).

^a For other directions of the writ of *distringas*, vide post, § 22, &c.

^b It seems to be intended, by the language of this writ, that the sheriff should return the same, or at least the mandate thereon, to the court above.

To the sheriff (or sheriffs) of our city of —.

And note; the cities of *Canterbury, Exeter, Lichfield, and Worcester*, have only *one* sheriff each; but the cities of *Bristol, Chester, Coventry, Gloucester, Lincoln, London, Norwich, and York*, have *two* sheriffs, and the process should be directed accordingly^a.

(§ 22.)
Direction of writ of *distingas*, or *capias*, to sheriff, or sheriffs, of a city.
Ante, 82.

To the sheriff (or sheriffs) of our town and county of —.

And note; the towns and counties of *Carmarthen, Haverfordwest, Kingston upon Hull, Newcastle upon Tyne, Poole, and Southampton*, have only *one* sheriff; but the town and county of *Nottingham*, has *two* sheriffs^a.

(§ 23.)
The like, to sheriff, or sheriffs, of a town and county.
Ante, 82.

To the coroner of our city of *London*, (or, “coroners of our county of —.”)

(§ 24.)
To coroner.
Ante, 82.

To *I. K.* and *L. M.* elisors, appointed by our court of —, in this behalf.

(§ 25.)
To elisors.
Ante, 82.

To our chancellor of our county palatine of *Lancaster*, or his deputy there.

(§ 26.)
To county palatine.

To the reverend father in God, *William*, by divine providence, Lord Bishop of *Durham*, or to his chancellor there.

Ante, 81, 2.

To our constable of our Castle of *Dover*, or to his deputy or lieutenant.

(§ 27.)
To cinque porta.
Ante, 82, 3.

To the mayor and bailiffs of our borough of *Berwick upon Tweed*.

(§ 28.)
To *Berwick upon Tweed*.
Ante, 83.

In the court of King's Bench, &c. (265.) *A. B.* plaintiff, &c. (*id.*) *Mr. C. D.*

(§ 29.)
Notice to be subscribed to writ of *distingas*.

Take notice, that I have this day distrained upon your goods and chattels, for the sum of *forty* shillings, in consequence of your not having appeared in the said court, to answer to the said *A. B.* according to the exigency of a writ of *summons*, bearing *teste* on the — day of —; and that, in default of your appearance to the present writ, within *eight* days inclusive after the return hereof, the said *A. B.* will cause an appearance to be entered for you, and proceed thereon to judgment and execution, or (*if the defend-*

Ante, 79, 83, 4.

^a For the periods when particular been made counties, see Tidd *Proc.* 9 Ed. cities, or towns, are supposed to have *Append.* 58. (n.)

CH. IV, &c. *ant be subject to outlawry,*) will cause proceedings to be taken to outlaw you.

(§ 30.) *This form is similar to that on the writ of summons, for which*
Statement of plaintiff's claim, *vide ante*, p. 263.
for debt and costs.

(§ 31.) *To I. K. and L. M. my bailiffs.*
Sheriff's warrant, —, (to wit). By virtue of the king's writ, issued out of his
on *distringas*. majesty's court of King's Bench, (Common Pleas, or Exchequer of
Ante, 84. Pleas,) and bearing date at *Westminster*, the — day of — instant, (or last,) to me directed, I command you, that you omit not by reason of any liberty in my bailiwick, but that you enter the same, and distrain upon the goods and chattels of *C. D.* for the sum of *forty* shillings, in order to compel his appearance in his majesty's said court, to answer *A. B.* in a plea of trespass on the case, (or debt, &c. *as the case may be* :) And I do further command you, that you do serve on the said *C. D.* if he can be met with, or if not, that you then leave at the place where you shall execute this my warrant, the copy of the writ and notice herewith delivered to you : and how you shall execute this my warrant, forthwith certify to me, so that I may make the same known to the king, in his majesty's said court, on the — day of — next. Dated the — day of — 18—.

The plaintiff claims —*l.* for debt, and —*l.* for costs. And if the amount thereof be paid to the plaintiff, or his attorney, within *four* days from the service hereof, further proceedings will be stayed.

Before you distrain the defendants, beware they are not ambassadors, or servants to ambassadors, or any otherwise privileged, or protected.

(§ 32.) *William the Fourth, &c. (262).* To the sheriff of *Lancashire*,
Mandate to sheriff in county palatine of *Lancaster*. greeting : We command you, that you omit not by reason of any liberty in your bailiwick, but that you enter the same, and distrain upon the goods and chattels of *C. D.* for the sum of *forty* shillings, in order to compel his appearance in our court of King's Bench, (Common Pleas, or Exchequer of Pleas,) to answer *A. B.* in a plea of trespass on the case, (or debt, &c. *as the case may be* ;) and how you shall execute this our writ, make known to us, (or, in *C. P.* to our justices, or, in the *Exchequer*, to the barons of our Exchequer,) in our said court, on the — day of — now next

ensuing. Witness ourself at *Lancaster*, the — day of — in CH. IV, &c.
the — year of our reign. (*adding the notice to be subscribed*
to the writ, and indorsements thereon.) Holt.

William the Fourth, &c. (262.) To the sheriff of *Durham*, (\$ 32. a.)
greeting: Know that our writ, out of our court of King's Bench, The like, in
(Common Pleas, or Exchequer of Pleas,) at *Westminster*, was di- *Durham*.
rected to the right reverend father in God, *William*, by divine Ante, 78, 4. (c.)
providence, Lord Bishop of *Durham*, or to his chancellor there, in 84.
these words: (*here copy the writ verbatim, to the end, and proceed as follows:*) Therefore we command you, that you execute the tenor of this writ, in all things, duly; and what you shall do therein, certify to us in the Chancery at *Durham*, before the said return; and have you there then this writ. Witness *William* Bishop of *Durham*, at *Durham*, the — day of —, (*the day of making out the mandate,*) in the — year of our reign.

— (Cursitor's name.)

I have distrained on the goods and chattels of the within named C. D. for the sum of *forty* shillings: And I further certify, that I forthwith delivered to the said C. D. a copy of the within writ and notice. The answer of —, sheriff. (\$ 33.)
Return of execution of *distringas*, where defendant is personally served. Ante, 85. 110.

I have distrained, &c. (*as above.*) And I further certify, that not being able to meet with the said C. D. I left at the place where I made the said distress, a copy of the within writ and notice. The answer of —, sheriff. (\$ 33. a.)
The like, when he cannot be met with. Ante, 85.

The within named C. D. is not to be found in my bailiwick: And I further certify, that the said C. D. hath not any goods or chattels in my bailiwick, whereby I can distrain him, as within I am commanded. The answer of —, sheriff. (\$ 34.)
Return of *non est inventus*, and *nulla bona*. Ante, 85. 104. 110.



CHAP. VII, VIII. X, XI.

WRIT of CAPIAS, and PROCEEDINGS thereon; and
PROCESS of OUTLAWRY.

(§ 1.)
Præcipe for writ
of *capias*.
Ante, 93.

— (the county into which the writ is to be issued.) *Capias* for *A. B.* against *C. D.* of —, in the said county, in an action on promises, (or “of debt,” &c. as the case may be,) for —^l. by affidavit filed, (or, “by judge’s order.”)

E. F. of —, plaintiff’s attorney, &c. (*ante*, p. 262.)

(§ 2.)
Writ of *capias*.
Ante, 67. 89,
90. 96.

William the Fourth, &c. (262.) To the sheriff of —, (or, in the cinque ports, “To our Constable of *Dover Castle*”; or, in *Berwick*, “To the Mayor and Bailiffs of *Berwick upon Tweed*,” as the case may be^a), greeting: We command you, that you omit not by reason of any liberty in your bailiwick, but that you enter the same, and take *C. D.* of —, if he shall be found in your bailiwick^b, and him safely keep, until he shall have given you bail, or made deposit with you according to law, in an action on promises, (or, of debt, &c.) at the suit of *A. B.*, or until the said *C. D.* shall by other lawful means be discharged from your custody: And we do further command you, that, on the execution hereof, you do deliver a copy hereof to the said *C. D.* And we hereby require the said *C. D.* to take notice, that within eight days after execution hereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him, in our court of King’s Bench, (Common Pleas, or Exchequer of Pleas,) to the said action; and that, in default of his so doing, such proceedings may be had and taken, as are mentioned in the warning hereunder written, or indorsed hereon: And we do further command you the said sheriff, (&c.) that imme-

Ante, 106.

Ante, 107.

^a For other directions of the writ of *capias*, vide *ante*, 269.

^b If the defendant reside in a district or place, parcel of one county, but wholly situate within and surrounded by another, the sheriff of the former county may be commanded, that “he take the defendant, if he shall be found in his bailiwick, or

within any district or place which is wholly situate within, and surrounded by the county of —,” (or, if the writ be directed to the sheriff of the surrounding county, “within any district or place which is wholly situate within and surrounded by your county.”)

diately after the execution hereof, you do return this writ to our CH. VII, &c. said court, together with the manner in which you shall have executed the same, and the day of the execution hereof; or that if the same shall remain unexecuted, then that you do so return the same, at the expiration of *four* calendar months from the date hereof, or sooner, if you shall be thereto required by order of the said court, or by any judge thereof. Witness, &c. (263.)

William the Fourth, &c. (262.) To the chancellor of our county palatine of *Lancaster*, or his deputy there, (*or*, "To the reverend father in God, *William*, by divine providence, Lord Bishop of *Durham*, or to his chancellor there,") greeting: We command you, that by our writ, under the seal of our said county palatine, to be duly made, and directed to the sheriff of our said county palatine, you command the said sheriff, (*or, if in Durham*, that "by our writ, under the seal of your bishoprick, to be duly made, and directed to the sheriff of the county of *Durham*, you cause the said sheriff to be commanded,") that he omit not by reason of any liberty in his bailiwick, but that he enter the same, and take *C. D.* of —, if he shall be found in his bailiwick, and him safely keep, until he shall have given him bail, or made deposit with him according to law, in an action on promises, (*or, of debt, &c.*) at the suit of *A. B.* or until the said *C. D.* shall by other lawful means be discharged from his custody; and that you further command him, that, on execution thereof, he do deliver a copy thereof to the said *C. D.*; and that the said writ do require the said *C. D.* to take notice, that within *eight* days after execution thereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him, in our court of —, to the said action; and that, in default of his so doing, such proceedings may be had and taken, as are mentioned in the warning thereunder written, or indorsed thereon: And that you further command the said sheriff, that, immediately after the execution thereof, he do return that writ to our said court^a, together with the manner in which he shall have executed the same, and the day of the execution thereof; or that if the same shall remain unexecuted, then that he do so return the same, at the expiration of *four* calendar months from the date thereof, or sooner, if he shall be thereto required by order of the said court, or by any judge thereof. Witness, &c. (263.)

(§ 3.)
The like, to a
county palatine.
Ante, 90.

^a *Ante*, 268. (b.)

(§ 4.) *Memorandum, to be subscribed to writ of capias.* *N. B.* This writ is to be executed within *four* calendar months from the date thereof, including the day of such date, and not afterwards.
Ante, 69. 92.

(§ 5.) *Warning to defendant thereon.* 1. If a defendant, being in custody, shall be detained on this writ, or if a defendant, being arrested thereon, shall go to prison for want of bail, the plaintiff may declare against any such defendant, before the end of the term next after such detainer or arrest, and proceed thereon to judgment and execution.
Ante, 92. 105.

2. If a defendant, being arrested on this writ, shall have made a deposit of money, according to the statute 7 & 8 Geo. IV. c. 71. and shall omit to enter a common appearance to the action, the plaintiff will be at liberty to enter a common appearance for the defendant, and proceed thereon to judgment and execution.

Ante, 92. 108. 3. If a defendant, having given bail on the arrest, shall omit to put in special bail, as required, the plaintiff may proceed against the sheriff, or on the bail-bond.

Ante, 92. 104. 4. If a defendant, having been served only with this writ, and not arrested thereon, shall not enter a common appearance within *eight* days after such service, the plaintiff may enter a common appearance for such defendant, and proceed thereon to judgment and execution.

(§ 6.) *Indorsements to be made on writ of capias, before execution thereof.* Bail for — *l.* by *affidavit*, or, (if by judge's order,) "Bail for — *l.* by order of —", (naming the judge making the order). Dated the — day of — 18—.

Ante, 69. 92. This writ was issued by *E. F.* of —, attorney for the plaintiff (or plaintiffs) within named; or, (if no attorney was employed,) "This writ was issued in person, by the plaintiff within named, who resides at —," (mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house, of the plaintiff's residence, if any such there be.

(§ 7.) *Statement of plaintiff's claim, for debt and costs.* The plaintiff claims — *l.* for debt, and — *l.* for costs; and if the amount thereof be paid to the plaintiff, or his attorney, within *four* days from the service hereof, further proceedings will be stayed.
Ante, 93.

(§ 8.) *Sheriff's warrant, on capias.* —, (to wit.) — Esquire, sheriff of the county aforesaid, To *I. K.* and *L. M.* my bailiffs, greeting: By virtue of the king's writ,
Ante, 95, 6.

issued out of his Majesty's court of King's Bench, (Common Pleas, CH. VII, &c. or Exchequer of Pleas,) at *Westminster*, bearing date the — day of — instant, (or last,) to me directed, I command you, each and every of you, jointly and severally, that you, or any of you, omit not by reason of any liberty in my bailiwick, but that you enter the same, and take *C. D.* if he shall be found in my bailiwick, and him safely keep, until he shall have given me bail, or made deposit with me according to law, in an action on promises, (or "of debt," &c. *as the case may be*,) at the suit of *A. B.* or until the said *C. D.* shall by other lawful means be discharged from my custody: And I do further command you, that on execution hereof, you do deliver to him the copy of the said writ herewith delivered to you: And I do further command you, or any of you, that immediately after the execution hereof, you do certify to me, the manner in which you shall have executed the same, and the day of the execution hereof, so that I may return the same to his Majesty's said court; or that if the same shall remain unexecuted, then that you do so return this my warrant, at the expiration of *four* calendar months from the date of the said writ, or sooner, if thereto required. Dated the — day of — 18—.

Writ issued by *E. F.* plaintiff's attorney, (or "by the said *A. B.* in person.")

Oath for — l.

Before you arrest the defendants, beware they are not privileged as ambassadors, or servants to ambassadors, or any otherwise privileged, or protected.

Memorandum subscribed to the writ.

N. B. This writ is to be executed within *four* calendar months from the date thereof, including the day of such date, and not afterwards.

William the Fourth, &c. (262.) To the sheriff of *Lancashire*, greeting: We command you, that you omit not by reason of any liberty in your bailiwick, but that you enter the same, and take *C. D.* of —, if he shall be found in your bailiwick, and him safely keep, &c. (as in the writ of *capias*, to the teste, commanding the sheriff, in the second person, to do what is required to be done by the writ; and the mandate is tested as follows: "Witness ourself at *Lancaster*, the — day of —, in the — year of our reign:" and contains the memorandum subscribed to the writ, and the warning and indorsements thereon.)

(§ 9.)
Mandate to sheriff, in county palatine of *Lancaster*.
Ante, 96.

Holt.

(§ 9. a.)
The like, in
Durham.
Ante, 96.

This mandate, after the copy of the capias, is similar to that on the distringas, for which vide ante, 271.

(§ 10.)
Order for sheriff
to arrest one de-
fendant, and
serve copy of
writ on another.
Ante, 95.

In the King's Bench, &c. (265).

A. B. plaintiff, &c. (*id.*)

You are hereby ordered and required, under the writ to you directed and delivered in this cause, to arrest the above named *C. D.* only, and to serve a copy thereof on the above named *G. H.* Dated this — day of —, 18—.

Your's, &c.,

E. F., plaintiff's attorney (*or agent*.)

To the sheriff of —, }
and Messrs. *I. K.* & *L. M.*, }
his bailiffs.

(§ 11.)
Bail bond.
Ante, 89. 97.

Know all men by these presents, that we *C. D.* of —, *I. K.* of —, and *L. M.* of —, are held and firmly bound to *G. H.*, Esquire, sheriff of the county of —, in the penal sum of — *l.* (*double the sum indorsed on the writ,*) of good and lawful money of *Great Britain*, to be paid to the said sheriff, or his certain attorney, executors, administrators, or assigns; for which payment, to be well and faithfully made, we bind ourselves, and every one of us by himself, for the whole and every part thereof, and the heirs, executors, and administrators of us, and every of us, firmly by these presents: Sealed with our seals. Dated this — day of —, in the — year of the reign of our sovereign lord *William* the Fourth, by the grace of God, of the united kingdom of *Great Britain* and *Ireland* King, Defender of the Faith, and in the year of our Lord 18—.

Condition.

Whereas the above bounden *C. D.* was, on the day of the date hereof, (*or*, on the — day of — instant, *or last*,) taken by the said sheriff, in the bailiwick of the said sheriff, by virtue of the king's writ of *capias*, issued out of his majesty's court of King's Bench, (*Common Pleas, or Exchequer of Pleas*,) bearing date at *Westminster*, the — day of — instant, (*or last*,) to the said sheriff directed and delivered, against the said *C. D.* in an action on promises, (*or of debt, &c. as the case may be,*) at the suit of *A. B.* And whereas a copy of the said writ, together with every memorandum or notice subscribed thereto, and all indorsements thereon, was, on execution thereof, duly delivered to the said

C. D. And whereas he is, by the said writ, required to cause special bail to be put in for him in the said court, to the said action, within *eight* days after execution thereof on him, inclusive of the day of such execution. Now the condition of this obligation is such, that if the said *C. D.* do cause special bail to be put in for him to the said action, in his majesty's said court, as required by the said writ, then this present obligation to be void and of no force, otherwise to stand and remain in full force, vigour, and effect.

Sealed and delivered, }
in the presence of }

Oath for — *l.*
Attorney, *E. F.*

This writ was executed by me, on —, the — day of —, 18—. —, sheriff. (§ 12.)

Indorsement to be made on *capias*, after execution.

— (262.) *Alias* (or *pluries*) writ of *capias*, for *A. B.* against *C. D.* of —, in the said county, in an action on promises, (or "of debt," &c. *as the case may be*), for — *l.* by affidavit filed, (or "by judge's order.") *E. F.* &c. (*id.*)

Ante, 96, 7.

(§ 13.)

Præcipe for *alias*, or *pluries capias*.

Ante, 98.

William the Fourth, &c. (262.) To the sheriff, &c. (*id.*) We command you, as before (or, often) we have commanded you, that you omit not, &c. (272.)

(§ 14.)

Alias, and *pluries capias*.

Ante, 76, 98.

William the Fourth, &c. (262.) To the sheriff of —, (*id.*) We command you, as heretofore we have commanded the sheriff of —, that you omit not, &c. (272, 3.)

(§ 15.)

The like, into another county.

Ante, 76, 98.

— (262.) *Exigi facias*, for *A. B.* against *C. D.* of —, in the said county, in an action on promises, (or, of debt, &c. *as the case may be*), for — *l.* by affidavit filed, (or "by judge's order.")

(§ 16.)

Præcipe for writ of *exigi facias*, after *capias*.

Ante, 98, 9.

E. F. &c. (*id.*)

William the Fourth, &c. (262.) To the sheriff of —, greeting: We command you, that you cause *C. D.* late of —, to be demanded from county court to county court, (or, if in London, "from husting to husting,") until, according to the law and custom of *England*, he be outlawed, if he do not appear; and, if he do appear, then that you take him, and cause him to be safely

(§ 17.)

Writ of *exigi facias*, after *capias*.

Ante, 98, 9.

CH. VII, &c. kept, until he shall have given you bail, or made deposit with you according to law, in an action on promises, (*or, of debt, &c.*) at the suit of *A. B.* or until the said *C. D.* shall by other lawful means be discharged from your custody: And whereupon you returned to us, (*in K. B.; or, in C. P. "to our justices," or, in the Exchequer, "to the barons of our Exchequer,"*) at *Westminster*, on the — day of — 18—, that the said *C. D.* was not found in your bailiwick: And we further command you, that if the said *C. D.* shall be taken on this writ, you do deliver a copy hereof to the said *C. D.* And we hereby require the said *C. D.* to take notice, &c. (*as in the capias, to the end of the notice to the defendant*). And how you shall execute this our writ, you make known to us, &c. (*as above,*) on the — day of — now next ensuing^a: and have there this writ. Witness, &c. (263.)

(§ 18.)
Notice or warn-
ing, and in-
dorsements on.
Ante, 70, 71.

The notice or warning written under, or indorsed on the writ of *capias*, and referred to in the writ of *exigent*, should be written or indorsed, in like manner, on the latter writ; as well as the indorsement of the sum for which bail is to be taken, and statement of the plaintiff's claim for debt and costs.

(§ 19.)
Writ of procla-
mation.
Ante, 99.

William the Fourth, &c. (262.) To the sheriff of —, greeting: Whereas by our writ we lately commanded you, that you should cause *C. D.* late of —, to be demanded from county court to county court, (*or, if in London, "from husting to husting,"*) until, according to the law and custom of *England*, he should be outlawed, if he did not appear, and, if he did appear, then that you should take him, and cause him to be safely kept, until he should have given you bail, &c. (*as in the exigent, to the end of the sheriff's return to the capias* :) Therefore we command you, that in pursuance of the statute made in the thirty-first year of the reign of the Lady *Elizabeth*, late Queen of *England*, you cause the said *C. D.* to be proclaimed, upon three several days, according to the form of that statute, one of which proclamations shall be made at or near the most usual door of the church of the parish where the said *C. D.* is dwelling, that he render himself unto you, so that you may have his body before us, (*in K. B.; or, in C. P. "before our said justices," or, in the Exchequer, "before the barons of our said Exchequer,"*) at *Westminster*, at the aforesaid

^a For the *teste* and return of this writ, *vide ante*, 99.

time, to answer to the said *A. B.* in the action (or, "of the plea") CH. VII, &c. aforesaid: and have there this writ. Witness, &c. (263.)

William the Fourth, &c. (262.) To the sheriff of —, greeting: We command you, that you cause *C. D.* late of —, to be demanded from county court to county court, (or, if in London, "from husting to husting,") until, according to the law and custom of *England*, he be outlawed, if he do not appear, and, if he do appear, then that you take him, and cause him to be safely kept, so that you may have his body before us, (in *K. B.*; or, in *C. P.* "before our justices," or, in the *Exchequer*, "before the barons of our *Exchequer*,") at *Westminster*, on —, to satisfy *A. B.* of —*l.* (or, "of a certain debt of —*l.*") which the said *A. B.* lately in our court before us, &c. (as above,) recovered against him, &c. (as in a common *capias ad satisfaciendum*, to the words "whereof, &c."): And whereupon you returned to us, (in *K. B.*; or, in *C. P.* "to our said justices," or, in the *Exchequer*, "to the barons of our said *Exchequer*,") at *Westminster*, on, &c. (the return day of the *capias ad satisfaciendum*,) last past, that the said *C. D.* was not found in your bailiwick: and have there this writ. Witness, &c. (263.)

(§ 20.)
Exigi facias,
after judgment.
Anse, 99, 100.
(§.)

CHAP. XII.

AFFIDAVITS *for*, and ENTRIES of APPEARANCE.

In the King's Bench, &c. (265.) *A. B.* plaintiff, &c. (*id.*)

G. H. of —, clerk to *E. F.* gentleman, attorney for the above named plaintiff, maketh oath and saith, that he this deponent did, on — the — day of — instant, (or last,) personally serve the above named defendant, with a true copy of a writ of *summons*, and of the *memorandum* subscribed thereto, and indorsements made thereon, and which writ of *summons* appeared to this deponent to have been regularly issued out of, and under the seal of this honourable court, against the said defendant, at the suit of the said plaintiff, on the — day of — instant, (or last.) And this

(§ 1.)
Affidavit of per-
sonal service of
writ of sum-
mons.
Anse, 76. 103.

CHAP. XII. deponent further saith, that he did, on the — day of — instant, (or last,) indorse on the said writ, the day of the week and month of such service.

Sworn, (&c.)

G. H.

(§ 2.)
Affidavit of execution of writ of *distringas*, and personal service of copy.
Ante, 85. 104.

In the King's Bench, &c. (265.)

A. B. plaintiff, &c. (*id.*)

I. K. of — officer to the sheriff of the county of —, maketh oath and saith, that he this deponent did, on the — day of — instant, (or last,) by virtue of a warrant granted by the said sheriff, upon a writ of *distringas*, which appeared to this deponent to have been regularly issued out of, and under the seal of this honourable court, against the said C. D. at the suit of the said A. B., directed to the said sheriff, and returnable on the — day of — last, (instant, or next,) distrain upon the goods and chattels of the said defendant, for the sum of *forty* shillings, in order to compel his appearance in the said court, to answer the said plaintiff, in a plea of trespass on the case, (or of debt, &c. *as the case may be*):* And this deponent further saith, that he did, at the time of the execution of the said writ of *distringas*, personally serve the said defendant with a true copy of the said writ of *distringas*, and of the notice subscribed thereto, and indorsements made thereon.

Sworn, (&c.)

I. K.

(§ 2. a.)
The like, where defendant cannot be met with.
Ante, 85. 104.

(*As in the last, to the asterisk, and then as follows:*)

And this deponent further saith, that not being able to meet with the said C. D. he this deponent did, at the time of the execution of the said writ of *distringas*, leave a true copy thereof, and of the said notice and indorsements, with — the wife (or son, daughter, or servant, &c.) of the said defendant, at his dwelling house, or usual place of abode, at —, in the said county, being the place where the said writ of *distringas* was executed; and this deponent then and there informed the said wife (or son, &c.) of the said defendant, of the true intent and meaning of such *distringas*, levy, and notice as aforesaid.

Sworn, (&c.)

I. K.

(§ 3.)
Affidavit for leave to enter appearance, on return of *non est inventus* and *nulla bona*, to

In the King's Bench, &c. (265.)

A. B. plaintiff, &c. (*id.*)

I. K. of — officer to the sheriff of the county of —, and G. H. of — (the person who made the affidavit to obtain the *distringas*), clerk to E. F. gentleman, attorney for the above named plaintiff, severally make oath and say; and first this deponent I. K.

for himself saith, that a writ of *distringas* having been issued out of, and under the seal of this honourable court, against the said defendant, at the suit of the said plaintiff, directed to the said sheriff, and returnable on the — day of — last, (or instant,) and a warrant having been granted thereon, directed to this deponent, as one of the officers of the said sheriff, he this deponent did take and use all due and proper means for serving and executing the said writ; and for that purpose did, on the — day of — 18—, go to the dwelling house (or place of residence) of the said defendant, &c. (as in pp. 265, 6. stating that three applications were made by the officer, and a copy of the writ and notice left for the defendant, at his dwelling house, &c. and that from the answers given to his enquiries, or otherwise, he has reason to believe that the defendant keeps out of the way, to avoid being served with process :) And this deponent further saith, that on making such enquiries after the said defendant, at his said dwelling house, (or place of residence,) he was informed by the wife (or son, &c.) of the said defendant, that there was nothing there belonging to him, as his house (or “lodgings”) were let to him ready furnished; (or, “that he had removed from and left his said dwelling house,” &c.) And this deponent further saith, that not being able to meet with the said defendant, or to discover that he had any goods or chattels, in the bailiwick of the said sheriff, whereby he could be distrained, he this deponent, for the reasons aforesaid, caused the said writ of *distringas* to be returned *non est inventus* and *nulla bona*. And this deponent G. H. for himself saith, that the said writ of *distringas* was issued by leave of this honourable court, (or, “of the honourable Mr. Justice —,”) on an *affidavit* made by him this deponent, a copy whereof is hereunto annexed; (annexing such copy;) and that, for the reasons stated in his said *affidavit*, and by the said other deponent I. K. as hereinbefore mentioned, he this deponent verily believes that the said defendant keeps out of the way, to avoid being served with process. And this deponent further saith, that he did, on the — day of — instant, (or last,) search in the proper office of this honourable court, for the return of the said writ of *distringas*; and there found that the said sheriff had returned to the said writ, that the said defendant was not to be found in his bailiwick, and that he had not any goods or chattels therein, whereby the said sheriff could distrain him. And lastly, this deponent saith, that the said defendant hath not appeared to the said writ.

Sworn, (&c.)

I. K.

G. H.

(§ 4.)
Rule thereon,
for entering ap-
pearance, in
term time.
Ante, 85, 6.
104.

In the King's Bench, &c. (267.)

B. } Upon reading the *affidavit* of *I. K.* and *G. H.* it is or-
v. } dered, that the plaintiff be at liberty to enter an appearance
D. } for the defendant in this action, according to the statute in
that case made and provided, and to proceed thereon to judg-
ment and execution.

By the Court.

(§ 5.)
Judge's order,
in vacation.
Ante, 85, 6.
104.

B. } Upon reading the *affidavit* of *I. K.* and *G. H.* I do order,
v. } that, &c. (*as in last, to the end, concluding thus:*) Dated
D. } this — day of — 18—.

—, (judge's, or baron's name.)

(§ 6.)
Affidavit of ser-
vice of *capias*, on
one of several
defendants.
Ante, 104.

In the King's Bench, &c. (265.)

A. B. plaintiff, against *C. D.* and *E. F.* defendants.

I. K. of —, in the county of —, officer to the sheriff
of —, maketh oath and saith, that he did, on the — day
of — instant, (*or last,*) personally serve the above named
defendant *C. D.* with a true copy of a writ of *capias*, and of
the *memorandum* subscribed thereto, and warning and indorse-
ments thereon, and which writ of *capias* appeared to this deponent
to have been regularly issued out of, and under the seal of this
honourable court, on the — day of — instant, (*or last,*)
against the said defendants, at the suit of the said plaintiff. And
this deponent further saith, that he did, on the — day of the said
month of —, duly indorse on the said writ of *capias*, the day of
the execution thereof.

Sworn, (&c.)

I. K.

(§ 7.)
Memorandum of
appearance by
defendant, when
he appears in
person, or by at-
torney.

In the King's Bench, &c. (265.)

A. B. plaintiff, against *C. D.*

The defendant appears in person, *or, (if by attorney,)*

G. H. attorney for *C. D.* appears for him.

Ante, 105.

(§ 8.)
The like, when
there are several
defendants.

A. B. plaintiff, against *C. D.* and another, (*or, C. D.* and others.)

The defendants appear in person, *or, (if by attorney,)*

G. H. attorney for *C. D.* and *I. K.* appears for them.

Ante, 105.

(§ 9.)
The like, when
one of several
defendants is
served with
capias.

A. B. plaintiff, against *C. D.* sued with *G. H.* or "with *G. H.* and
others."

The defendant *C. D.* appears in person, *or, (if by attorney,)*

G. H. attorney for *C. D.* appears for him.

Ante, 105.

A. B. plaintiff, against *C. D.* (*or, C. D.* and another, &c.)

E. F. attorney for the plaintiff, appears for the defendant *C. D.* (*or, C. D.* and another, &c.) according to the statute.

Entered the — day of —, 18—.

(§ 10.)
The like, when
appearance is
entered by plain-
tiff.
Ante, 105.

CHAP. XIII.

ASSIGNMENT of BAIL BOND; and PROCEEDINGS for compelling SHERIFF to RETURN WRIT, &c.

I the within named sheriff, at the request of the within named plaintiff, assign over to him this bail bond, pursuant to the statute in that case made and provided: In witness whereof, I have hereunto set my hand and seal, this — day of —, 18—. —, sheriff.

(§ 1.)
Assignment of
bail bond.
Ante, 108.

Sealed and delivered, }
in the presence of }
I. K.
L. M.

In the King's Bench, &c. (267.)

(*For the mode of entitling rules, in the different courts, see id.*)

B. } It is ordered, that the sheriffs (*or, late sheriffs*) of *London*
v. } shall, within *four* days next after notice of this rule, to be given
D. } to their secondaries, (*or, "that the sheriff, or late sheriff, of the*
county of — shall, within *four* days in *Middlesex*, or *six* days in
any other county, next after notice of this rule, to be given to his
undersheriff, or deputy,") peremptorily return the writ of *capias*,
issued between the parties.

(§ 2.)
Rule to return
writ of *capias*, in
term time.
Ante, 108.

By the Court.

Side bar (in K. B. or Exchequer;)

In the Treasury Chamber, at the
instance of the plaintiff, (in C. P.)

(§ 8.)
Affidavit for obtaining judge's order to return writ, in vacation.
Ante, 109.

In the King's Bench, &c. (265.) *A. B. plaintiff, &c. (id.)*

G. H. of —, clerk to *E. F.* gentleman, attorney for the above named plaintiff, maketh oath and saith, that on the — day of — instant, (or last,) a writ of *capias* was issued out of, and under the seal of this honourable court, against the above named defendant, at the suit of the said plaintiff, directed and delivered to the sheriff of —. And this deponent further saith, that he has since been informed and verily believes, that the said defendant has been arrested upon and by virtue of the said writ.

Sworn, (&c.)

G. H.

(§ 4.)
Judge's order thereon.
Ante, 108, 9.

B. } I order, that the sheriffs, (or late sheriffs,) &c. (as in § 2.
v. } substituting the word "order," for the word "rule.") Dated
D. } the — day of —, 18—.

—, (judge's, or baron's name.)

(§ 5.)
Affidavit of service of rule to return writ, &c.
Ante, 110.

In the King's Bench, &c. (265.)

A. B. plaintiff, &c. (id.)

G. H. of —, clerk to *E. F.* gentleman, attorney for the above named plaintiff, maketh oath and saith, that he this deponent did, on the — day of — instant, (or last,) personally serve Mr. —, who is or acts as deputy to the secondaries of the city of London, at their office No. 5, Basinghall Street, (if in London; or, if in Middlesex, "Mr. —, who is or acts as deputy sheriff of the county of Middlesex"; or, if in any other county, "Mr. —, who is the under sheriff, or deputy to the sheriff, of the county of —, at his residence, or office", situate, &c.") with a true copy of the rule hereunto annexed; and at the same time shewed him the said original rule. And this deponent further saith, that he has this day searched (or, "did, on the — day of — instant, or last, search,") in the proper office of this honourable court, for the return of the writ of *capias*, issued in this cause, but that the same was not filed in the said office.

Sworn, (&c.)

G. H.

* By the late act for the further amendment of the law, &c. (3 & 4 W. IV. c. 42.) § 20, "the sheriff of each county in *England* and *Wales*, shall severally name a sufficient deputy, who shall be resident, or have an office, within one mile from the *Inner Temple Hall*,

for the receipt of writs, granting warrants thereon, making returns thereto, and accepting of all rules and orders, to be made on, or touching the execution of any process or writ, to be directed to such sheriff." *Ante*, 84, 5.

In the King's Bench, &c. (265.)

A. B. plaintiff, &c. (*id.*)

(§ 6.)

(*As in last, to the end*; substituting the word "order" for the word "rule," *and concluding as follows* :) And this deponent further saith, that the said order was, on the — day of —, in this present — term, being the term next following the making and granting of the said order, made a rule of this honourable court, as appears by such rule hereunto annexed, (*annexing it.*)

The like, of service of judge's order, &c.

Ante, 110.

Sworn, (&c.)

G. H.

In the King's Bench, &c. (267.)

B. } Upon reading the rule (*or "order"*) made in this cause, on
v. } —, and the *affidavit* of *G. H.* it is ordered, that a writ of
D. } attachment do issue against the sheriffs (*or, late sheriffs*) of
London, (*or sheriff, or late sheriff, of the county of —,*) for their (*or*
his) contempt, in not returning the writ of *capias*, issued in this
cause, pursuant to the said rule (*or, "order."*) Upon the motion of
Mr. —, (*in K. B. or Exchequer; or, in the Common Pleas, of*
Mr. Serjeant —.)

(§ 7.)

Rule for attachment, for not returning writ.

Ante, 110.

By the Court.

For these returns, *vide ante*, p. 271.

(§ 8, 9.)

Returns to writ of *distringas*.

By virtue of this writ, to me directed, I did, on the — day of — 18—, take the within named *C. D.*, and him safely kept, until he gave me bail, (*or made deposit with me*) according to law, in the within action. And I further certify, that on the execution of the said writ, I delivered a copy thereof to the said defendant, as I am within commanded.

(§ 10.)

Return of *cepi corpus*, when defendant has given bail, or made deposit, &c.

Ante, 110.

The answer of —, sheriff.

By virtue, &c. (§ 10.) I did, on the — day of — 18—, take the within named *C. D.* whose body remains in the prison of the lord the king, under my custody. And I further certify, &c. (*as in last.*)

(§ 11.)

The like, when he remains in custody.

Ante, 110.

The answer of —, sheriff.

By virtue, &c. (§ 10.) I did, on the — day of — 18—, take the within named *C. D.*, and him safely kept, until he gave me bail, &c. (*as in § 10. or, "whose body remains," &c. as in § 11.*) And I further certify, &c. (§ 10.) But the within named *E. F.* is not found in my bailiwick.

(§ 12.)

Return of *cepi corpus*, as to one defendant, and *non est inventus* as to another.

Ante, 110.

The answer of —, sheriff.

(§ 13.)
The like, of *cepi corpus* as to one defendant, and service of copy of writ on another.

Ante, 110.

By virtue, &c. (§ 10.) I did, on the — day of —, 18—, take the within named *C. D.* &c. (*id.*) And I further certify, that I did, on the — day of — instant, (*or last*,) by the order and direction of the attorney for the said *A. B.* serve a copy of this writ on the within named *E. F.*

The answer of —, sheriff.

(§ 14.)
Return of *non est inventus*.

Ante, 110.

The within named *C. D.* is not found in my bailiwick *.

The answer of —, sheriff.

(§ 15.)
Rule to bring in body, in *K. B.*
Tidd Prac. 9
Ed. 310.

Ante, 110. (*k.*)

In the King's Bench.

— the — day of —, &c. (267.)

B. } It is ordered, that the sheriffs (*or late sheriffs*) of *London*
v. } shall, within *four* days next after notice of this rule, to be
D. } given to their secondaries, (*or*, "that the sheriff, *or late sheriff*,
of the county of — shall, within *four* days in *Middlesex*, *or* "*six*
days" in *any other county*, next after notice of this rule, to be given
to his undersheriff, *or deputy*,") peremptorily bring into court the
body of the defendant.

Side Bar.

By the Court.

(§ 16.)
The like, as
given by filacer,
in *C. P.*

Tidd Prac. 9
Ed. 310.

Ante, 110. (*k.*)

In the Common Pleas.

— term, &c. (267.)

B. } Unless the sheriffs (*or late sheriffs*) of *London*, &c. (*as in*
v. } *last*,) do cause the body of the defendant to be brought into
D. } this court, on —, let them (*or him*) be amerced *forty* shillings.

By the Court.

(§ 17.)
The like, as
drawn up by se-
condary thereon.
Tidd Prac. 9
Ed. 310.

Ante, 110. (*k.*)

B. } Upon reading the filacer's rule, made between the said
v. } parties, it is ordered, that the sheriffs (*or late sheriffs*) of
D. } *London*, &c. (*as in* § 15.)

By the Court.

In the Treasury Chamber, }
at the instance of the plaintiff. }

(§ 18.)
The like, in Ex-
chequer.

Tidd Prac. 9
Ed. 310.

Ante, 110.

—, the — } Sidebar. It is ordered, that the sheriff of the
day of —. } county of —, do peremptorily bring here into
court, the body of the said defendant, whom he hath taken, and

* For other forms of returns to the 9 *Ed.* Chap. XIII. § 18, &c.
writ of *copias*, see *Append.* to *Tidd Prac.*

detains in his custody, by virtue of his Majesty's writ of *capias*, CHAP. XIII.
issued between the said parties, as the said sheriff hath charged
himself by his return made on the said writ, within *four* days (*in*
Middlesex, or "*six* days" in any other county,) next after notice of
this rule, to be given to him, or his undersheriff.

By the Court.

Rose.

In the King's Bench, &c. (265.) A. B. plaintiff, &c. (*id.*)

G. H. of —, clerk to E. F. gentleman, attorney for the above
named plaintiff, maketh oath and saith, that he this deponent did,
on the — day of — instant, (*or last*,) personally serve, &c., (*as*
in § 5.) And this deponent further saith, that he has this day
searched (*or "did, on the — day of — instant, or last, search"*)
with the proper officer of this honourable court, for the writ of
capias issued in this cause, and found that the same was filed, with
a return of the said sheriff indorsed thereon, to the effect, that the
said sheriff had, on the — day of — 18—, taken the said
C. D. and him safely kept, until he had given him bail in the said
action; and that, on the execution of the said writ, he had delivered
a copy thereof to the said C. D. as by the said writ he was com-
manded.

Sworn, (&c.)

G. H.

(§ 19.)
Affidavit for ob-
taining judge's
order, to bring
in body, in va-
cation.

Ante, 111.

B. } I order, that the sheriffs (*or late*) sheriffs, &c. (*as in § 15*;
v. } substituting the word "order," for the word "rule.") Dated
D. } this — day of —, 18—.

— (judge's, or baron's name.)

(§ 20.)
Judge's order
thereon.

Ante, 110.

In the King's Bench, &c. (265.) A. B. plaintiff, &c. (*id.*)

G. H. of —, clerk to E. F. gentleman, attorney for the above
named plaintiff, maketh oath and saith, that he this deponent did,
on the — day of — instant, (*or last*,) personally serve, &c. (*as*
in § 5.) And this deponent further saith, that no bail above has
been put in for the defendant in this cause, (*or "that bail above*
has been put in for the defendant in this cause, but that the same has
not been perfected"; adding, in the *Common Pleas*, "this deponent
having this day searched with the proper officer of the court, for
that purpose.")

Sworn, (&c.)

G. H.

(§ 21.)
Affidavit of ser-
vice of rule to
bring in body,
&c.

Ante, 111. (a.)

(§ 21. *u.*) In the King's Bench, &c. (265.) *A. B.* plaintiff, &c. (*id.*)
 The like, of *G. H.* of —, clerk to *E. F.* gentleman, attorney for the above
 judge's order, &c. named plaintiff, maketh oath and saith, that he did, on the —
Ante, 111. (*a.*) day of — instant, (*or last*,) personally serve, &c. (*as in* §§ 5, 6.)
 And this deponent further saith, that no bail above, &c. (*as in last*).
 Sworn, (&c.) *G. H.*

(§ 22.) This rule is similar to that in § 7., stating the contempt to be
 Rule for attach- "in not bringing into court the body of the defendant," instead of
 ment, for not "in not returning the writ," &c.
 bringing in body. *Ante*, 111. (*a.*)

CHAP. XV.

PROCEEDINGS *in* ACTIONS *against* PRISONERS *.

(§ 1.) — Writ of *detainer*, for *A. B.* against *C. D.* in custody of the
Præcipe for writ marshal of the Marshalsea, (*or*, warden of the Fleet prison,) in an
 of *detainer*. action on promises, &c. (262.)
Ante, 115.

(§ 2.) *William* the Fourth, &c. (262.) To the marshal of the Mar-
 Writ of *detainer*. shalsea of our court before us, (*or*, "To the warden of our prison
Ante, 67. 114, of the *Fleet* :") We command you, that you detain *C. D.* if he shall
 115. be found in your custody, at the delivery hereof to you, and him
 safely keep, in an action on promises, (*or*, "of debt," &c. *as the case*
may be,) at the suit of *A. B.* until he shall be lawfully discharged
 from your custody : And we do further command you, that on re-
 ceipt hereof, you do warn the said *C. D.* by serving a copy hereof.

* When the defendant is a prisoner in custody of the sheriff, &c., a *bill* must, it seems, be filed against him, in the King's Bench, with the clerk of the declarations in the King's Bench office ; it being holden, that the delivery of a declaration against such prisoner, though within *two* terms, is a nullity, if there were no bill filed before. *Nowell v. Bingham*, 4 East, 16. and see *Williams v. Scudamore*, 1 Chit. Rep. 389. *Long v. Wordsworth*, 4 Barn. & Ad. 367. It is not necessary, however, under the rule of H. 2 W. IV. reg. 2. that the statement of the plaintiff's claim, for debt and costs, should be indorsed on the copy of such bill, served upon the turnkey. *Long v. Wordsworth*, 4 Barn. & Ad. 367. and see *Lewellin v. Norton*, *id.* 368. & 1 Dowl. Rep. 416. S. C.

on him, that within *eight* days after service of such copy, inclusive of the day of such service, he do cause special bail to be put in for him, in our court of King's Bench, (Common Pleas, *or*, Exchequer of Pleas,) to the said action; and that, in default of his so doing, the said *A. B.* may declare against him, before the end of the term next after his detainer, and proceed thereon to judgment and execution: And we do further command you the said marshal, (*or*, "warden," *as the case may be*,) that immediately after the service hereof, you do return this our writ, or a copy hereof, to our said court, together with the day of the service hereof. Witness, &c. (§ 263.)

CHAP. XV.

N.B. This writ is to be indorsed in the same manner as the writ of *capias*; (*ante*, 274,) but not to contain the warning on that writ.

(§ 3.)
Indorsements
thereon.

Ante, 92. 115.

— (*Venue*.) *A. B.* by *E. F.* his attorney, (*or*, "in his own proper person"), complains of *C. D.* being detained at the suit of the said *A. B.* in the custody of the sheriff of —, (*or*, "of the marshal of the Marshalsea of the court of King's Bench," *or*, "of the warden of the Fleet.")

(§ 4.)
Commencement
of declaration,
when defendant
is in custody.

Ante, 113. 116.

For the form referred to in this section, (*ante*, 113. 116,) see the next Chapter, § 9.

(§ 5.)

In the King's Bench, &c. (265.)

A. B. plaintiff, &c. (*id.*)

(§ 6.)
Affidavit of de-
livery of copy of
declaration,
against prisoner
in custody of the
sheriff, &c.

Ante, 114.

G. H. of —, clerk to *E. F.* gentleman, attorney for the above named plaintiff, maketh oath and saith, that he did, on the — day of — instant, (*or last*,) deliver unto *I. K.*, the gaoler or keeper of his majesty's gaol or prison, in and for the county of —, a true copy of the declaration hereunto annexed; and the said gaoler or keeper then acknowledged to this deponent, that the said defendant was, at that time, a prisoner in the said gaol or prison, by virtue of a writ of *capias*, issued out of this honourable court, at the suit of the said plaintiff.

Sworn, (&c.)

G. H.

G. H. of —, clerk to *E. F.* gentleman, attorney for the above named plaintiff, maketh oath and saith, that he did, on the — day of —, instant, (*or last*,) deliver unto *I. K.*, one of the turnkeys of the King's Bench (*or* "Fleet") prison, at the lodge of the said prison, a true copy of the declaration hereunto annexed; and the said turnkey then acknowledged to this deponent, that the said

(§ 7.)
The like, against
a prisoner in
custody of mar-
shal, or warden.

Ante, 114.

CHAP. XII. deponent further saith, that he did, on the — day of — instant, (or last,) indorse on the said writ, the day of the week and month of such service.

Sworn, (&c.)

G. H.

(§ 2.)
Affidavit of execution of writ of *distringas*, and personal service of copy.
Ante, 85. 104.

In the King's Bench, &c. (265.) *A. B.* plaintiff, &c. (*id.*)

I. K. of — officer to the sheriff of the county of —, maketh oath and saith, that he this deponent did, on the — day of — instant, (or last,) by virtue of a warrant granted by the said sheriff, upon a writ of *distringas*, which appeared to this deponent to have been regularly issued out of, and under the seal of this honourable court, against the said *C. D.* at the suit of the said *A. B.*, directed to the said sheriff, and returnable on the — day of — last, (instant, or next,) distrain upon the goods and chattels of the said defendant, for the sum of *forty* shillings, in order to compel his appearance in the said court, to answer the said plaintiff, in a plea of trespass on the case, (or of debt, &c. *as the case may be*):* And this deponent further saith, that he did, at the time of the execution of the said writ of *distringas*, personally serve the said defendant with a true copy of the said writ of *distringas*, and of the notice subscribed thereto, and indorsements made thereon.

Sworn, (&c.)

I. K.

(§ 2. a.)
The like, where defendant cannot be met with.
Ante, 85. 104.

(*As in the last, to the asterisk, and then as follows:*)

And this deponent further saith, that not being able to meet with the said *C. D.* he this deponent did, at the time of the execution of the said writ of *distringas*, leave a true copy thereof, and of the said notice and indorsements, with — the wife (or son, daughter, or servant, &c.) of the said defendant, at his dwelling house, or usual place of abode, at —, in the said county, being the place where the said writ of *distringas* was executed; and this deponent then and there informed the said wife (or son, &c.) of the said defendant, of the true intent and meaning of such *distringas*, levy, and notice as aforesaid.

Sworn, (&c.)

I. K.

(§ 3.)
Affidavit for leave to enter appearance, on return of *non est inventus* and *nulla bona*, to

In the King's Bench, &c. (265.)

A. B. plaintiff, &c. (*id.*)

I. K. of — officer to the sheriff of the county of —, and *G. H.* of — (*the person who made the affidavit to obtain the distringas*), clerk to *E. F.* gentleman, attorney for the above named plaintiff, severally make oath and say; and first this deponent *I. K.*

for himself saith, that a writ of *distringas* having been issued out of, and under the seal of this honourable court, against the said defendant, at the suit of the said plaintiff, directed to the said sheriff, and returnable on the — day of — last, (or instant,) and a warrant having been granted thereon, directed to this deponent, as one of the officers of the said sheriff, he this deponent did take and use all due and proper means for serving and executing the said writ; and for that purpose did, on the — day of — 18—, go to the dwelling house (or place of residence) of the said defendant, &c. (as in pp. 265, 6. stating that three applications were made by the officer, and a copy of the writ and notice left for the defendant, at his dwelling house, &c. and that from the answers given to his enquiries, or otherwise, he has reason to believe that the defendant keeps out of the way, to avoid being served with process :) And this deponent further saith, that on making such enquiries after the said defendant, at his said dwelling house, (or place of residence,) he was informed by the wife (or son, &c.) of the said defendant, that there was nothing there belonging to him, as his house (or “lodgings”) were let to him ready furnished; (or, “that he had removed from and left his said dwelling house,” &c.) And this deponent further saith, that not being able to meet with the said defendant, or to discover that he had any goods or chattels, in the bailiwick of the said sheriff, whereby he could be distrained, he this deponent, for the reasons aforesaid, caused the said writ of *distringas* to be returned *non est inventus* and *nulla bona*. And this deponent G. H. for himself saith, that the said writ of *distringas* was issued by leave of this honourable court, (or, “of the honourable Mr. Justice —,”) on an *affidavit* made by him this deponent, a copy whereof is hereunto annexed; (*annexing such copy*;) and that, for the reasons stated in his said *affidavit*, and by the said other deponent I. K. as hereinbefore mentioned, he this deponent verily believes that the said defendant keeps out of the way, to avoid being served with process. And this deponent further saith, that he did, on the — day of — instant, (or last,) search in the proper office of this honourable court, for the return of the said writ of *distringas*; and there found that the said sheriff had returned to the said writ, that the said defendant was not to be found in his bailiwick, and that he had not any goods or chattels therein, whereby the said sheriff could distrain him. And lastly, this deponent saith, that the said defendant hath not appeared to the said writ.

Sworn, (&c.)

I. K.

G. H.

writ of *distringas*.
Ante, 85, 6.
104.

Writ of *capias*
issued out.

Ante, 93.

Recital of writ.

Ante, 89, 90.
272, 3.

Indorsement for
bail.

Ante, 92, 3. 274.

Delivery of writ
to sheriff.

Ante, 95.

Arrest.

Ante, 96.

Delivery of
copy of writ, &c.
to defendant.

Ante, 89, 96, 7.

Taking bail.

Ante, 89, 97.
106.

from him : For that whereas the said plaintiff, heretofore, to wit, on the — day of —, in the — year of the reign of our lord the now king, (*date of writ*,) sued and prosecuted out of his Majesty's court of King's Bench, (Common Pleas, or Exchequer of Pleas,) at *Westminster* in the county of *Middlesex*, a certain writ of our said lord the king, called a writ of *capias*, against the said *C. D.* directed to the sheriff of the county of —, and bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid : By which said writ, our said lord the king commanded the said sheriff, that he should omit not by reason of any liberty in his bailiwick, but that he should enter the same, and take the said *C. D.* if he should be found in his bailiwick, and him safely keep, &c. (*reciting the writ throughout, to the teste, for which vide ante, p. 272, 3.*) which said writ afterwards, and before the delivery thereof to the sheriff of the said county of —, to be executed, as is hereinafter mentioned, to wit, on the day and year aforesaid, in the county of —, (*the venue, if not laid in the county where the defendant was arrested,*) was duly marked and indorsed for bail for —*l.* by *affidavit*, according to the form of the statute in such case made and provided ; and which said writ, so indorsed, afterwards, to wit, on the day and year aforesaid, in the county last aforesaid, was delivered to the said *G. H.* who then, and from thence until, and at and after the execution of the said writ, and making of the writing obligatory hereinafter mentioned, was sheriff of the said county of —, in due form of law to be executed : By virtue of which said writ, the said *G. H.* so being such sheriff as aforesaid, afterwards, and within *four* calendar months from the date of the said writ, including the day of such date, to wit, on the — day of —, in the year of our Lord 18—, (*date of bail bond,*) within his bailiwick as such sheriff, to wit, in the county of — aforesaid, (*the county wherein the defendant was arrested,*) executed the said writ, and then and there took and arrested the said *C. D.* by his body, and had and detained him in his custody, as such sheriff, at the suit of the said plaintiff, for the cause aforesaid : And the said *G. H.* then and there, upon and forthwith after the execution of the said writ, caused a copy of the said writ, together with every *memorandum* and notice subscribed thereto, and all indorsements thereon, to be delivered to the said *C. D.* according to the form of the statute in such case made and provided : And the said *C. D.* being so arrested, and in custody of the said *G. H.* so being such sheriff as aforesaid, by

virtue of the said writ, at the suit of the said plaintiff, as aforesaid, the said *G. H.* afterwards, and within *eight* days after the execution of the said writ as aforesaid, inclusive of the day of such execution, to wit, on the day and year last aforesaid, and within the bailiwick of the said sheriff, to wit, in the county last aforesaid, took bail for the said *C. D.*'s causing special bail to be put in for him to the said action, in his said majesty's court of —, as required by the said writ, and according to the form of the statute in such case made and provided; and on that occasion, the said defendants then and there, to wit, on the day and year last aforesaid, in the county last aforesaid, by their certain writing obligatory, commonly called a bail-bond, sealed with their respective seals, and now shewn to his said majesty's court here, the date whereof is a certain day and year therein mentioned, to wit, the day and year last aforesaid, acknowledged themselves to be held and firmly bound to the said *G. H.* so then being sheriff of the said county of —, as such sheriff, (by the name, description, and addition of *G. H.* Esquire, sheriff of the county of —,) in the penal sum of —*l.* of good and lawful money of *Great Britain*, to be paid to the said sheriff, or his certain attorney, executors, administrators, or assigns; with and under a certain condition thereto subscribed, whereby, after reciting that the said *C. D.* was, on the — day of —, taken by the said sheriff, &c. (*stating the recital in the condition of the bond, for which, as taken by the sheriff of Middlesex, &c. vide ante*, pp. 276, 7,) the condition of the said writing obligatory was declared to be such, that if the said *C. D.* did cause special bail to be put in for him to the said action, in his majesty's said court, as required by the said writ, then the said obligation was to be void, and of no force, otherwise to stand and remain in full force, vigour and effect; as by the said writing obligatory, and the condition thereof, reference being thereunto had, may more fully and at large appear. And the said plaintiff in fact saith, that the said *C. D.* did not cause special bail to be put in for him to the said action, in his majesty's said court, as required by the said writ, but therein wholly failed and made default: whereby the said writing obligatory became forfeited. And the said plaintiff further saith, that the said writing obligatory being so forfeited, and the money therein specified being and remaining unpaid and unsatisfied to the said sheriff, he the said *G. H.* so being sheriff of the said county of — as aforesaid, afterwards, to wit, on the — day of —, in the year aforesaid, (*date of assignment*,) in the county of — aforesaid, (*the*

CH. XVII.

Bail bond.

Ante, 89. (f)
273.Condition of
bond.*Ante*, 89. (f)
276, 7.Breach of con-
dition, by not
putting in special
bail.*Ante*, 89. 93.
106. 108. 287.Assignment of
bond to plaintiff.*Ante*, 108. (c.)
283.

CH. XVII. *venue*,) at the request of the said *A. B.* the plaintiff in the said suit, by an indorsement on the said writing obligatory duly made, in the presence of and attested by two credible witnesses, and sealed with his seal of office of sheriff of the said county of —, assigned the said writing obligatory to the said plaintiff, according to the form of the statute in such case made and provided; as by the said assignment, indorsed on the said writing obligatory as aforesaid, and now shewn to his said majesty's court here, the date whereof is a certain day and year therein mentioned, to wit the day and year last aforesaid, may more fully appear: By means whereof, and by force of the statutes in such case made and provided, an action hath accrued to the said plaintiff, as assignee of the said *G. H.* so being sheriff of the said county of — as aforesaid, to demand and have of and from the said defendants, the said sum above demanded: Yet the said defendants (although often requested so to do,) have not, nor have nor hath any or either of them, as yet paid the said sum above demanded, or any part thereof, to the said *G. H.* before the said assignment, or to the said plaintiff, assignee as aforesaid, since the said assignment; but have hitherto wholly refused and neglected so to do, and still refuse to pay the same, or any part thereof, to the said plaintiff, assignee as aforesaid; to the damage of the said plaintiff, as assignee as aforesaid, of 10*l.* and therefore he brings his suit, &c.

Whereby an action hath accrued, &c.

(§ 11.)
Notice of filing declaration in chief, and to plead, &c., where plaintiff appears for defendant, on serviceable process.
Ante, 122, 3.

In the King's Bench, &c. (265.)

A. B. plaintiff, &c. (*id.*)

Take notice, that a declaration was this day (*or*, "on the — day of — instant, *or* last",) filed against you, with the clerk of the declarations in the King's Bench office, (*or*, in *C. P.* "with the prothonotaries, at their office in *Tanfield Court*,") in the *Inner Temple*, *London*; (*or*, in the *Exchequer of Pleas*, "in the office of Pleas of this honourable court, situate in *Lincoln's Inn*, in the county of *Middlesex*",) at the suit of the above named plaintiff, in an action on promises, (*or*, of debt, &c. *as the case may be*;) and unless you plead thereto in *four* days, (*or* "eight days," if the defendant live above *twenty miles from London*, or the venue be laid in the country,) judgment will be signed against you by default. Dated this — day of — 18—.

Yours, &c.

To Mr. *C. D.*,

the above named defendant.

} *E. F.* plaintiff's attorney.

In the King's Bench, &c. (265.)

A. B. plaintiff, &c. (id.)

(§ 12.)
Affidavit for obtaining leave to stick up notice of declaration in office.

G. H. of —, clerk to *E. F.* gentleman, attorney for the above named plaintiff, maketh oath and saith, that this action was commenced on the — day of — last, (*or instant,*) by a writ of *summons*, which appeared to this deponent to have been regularly issued out of, and under the seal of this honourable court, against the above named defendant, at the suit of the said plaintiff; and that he this deponent did, on the — day of — instant, (*or last,*) personally serve the said defendant with a copy of the said writ, but the said defendant hath not appeared, according to the exigency thereof. And this deponent further saith, that the said defendant hath, since the commencement of this action, removed from his last known dwelling house, situate at —, in the county of —; and that this deponent hath made inquiry after the said defendant, of the landlord of the house wherein he formerly resided, but could not learn to what place he had removed: And this deponent further saith, that he has also made inquiry at the counting house of *I. K.* of — aforesaid, by whom, as this deponent has been informed and believes, the said defendant was, up to the time of the service of the writ in this action, employed as collecting clerk, but could not learn his present residence, nor where he was to be found; and such residence is wholly unknown to this deponent, nor hath he been able to serve the said defendant, personally or otherwise, with a notice of declaration in this cause, which hath been duly filed in the proper office, with a notice requiring the said defendant to plead thereto in — days.

Sworn, (&c.)

G. H.

In the King's Bench, &c. (265.)

A. B. plaintiff, &c. (id.)

(§ 13.)
Notice of filing declaration, *de bene esse*, on bailable process.
Ante, 123, 4.

Take notice, that a declaration was this day (*or "on the — day of — instant, or last,"*) filed against you, with the clerk of the declarations in the King's Bench office, (*or, in the Common Pleas*, "with the prothonotaries, at their office in *Tanfield Court*,) in the *Inner Temple, London*, (*or, in the Exchequer of Pleas, &c. as in § 11.*) conditionally, until special bail be put in and perfected, (*or, if bail has been put in*, "until special bail be perfected,") at the suit of the above named plaintiff, in an action on promises, (*or, of debt, &c. as the case may be;*) and unless you appear and plead thereto in *four*

CH. XVII. (*or eight*) days, &c. (*as in § 11.*) judgment will be signed against you by default. Dated this — day of — 18—.

Yours, &c.

To Mr. C. D. } E. F. plaintiff's attorney.
the above named defendant. }

(§ 14.)
Demand of de-
claration.
Ante, 125.

In the King's Bench, &c. (265.) *B. against D.*

The defendant demands a declaration in this cause, by

Yours, &c.

To Mr. E. F. } G. H. defendant's attorney,
plaintiff's attorney, } (*or agent.*)
(*or agent.*)

CHAP. XX.

FORMS of PROCEEDINGS on INTERPLEADER ACT, 1 & 2 W. IV. c. 58. § 1.*

(§ 1.)
Notice of mo-
tion, on inter-
pleader act, in
action by exe-
cutors, for trial
of right to shares
and dividends in
a public com-
pany, claimed by
assignees of a
bankrupt.
Ante, 130, 31.

In the Common Pleas.

Between { *Cooper* and another, executors, (&c.) plaintiffs,
and
The Lead-smelting Company, defendants. *

Take notice, that this honourable court will be moved tomorrow, the — day of —, for a rule calling upon the assignees of *I. Y. C.* a bankrupt, to appear before this honourable court, and to state the nature and particulars of their claim to the sum of money sought to be recovered from the defendants by the plaintiffs in this action, and to maintain or relinquish their claim; and that in the mean time,

* For forms of rules, &c. on the above statute, § 6. *vide post*, Chap. XLI.

* This case is reported in 2 Moore & S. 714. and see *id.* 810. 9 Bing. 634. 1 Dowl. Rep. 728. S. C. *Ante*, 131.

all further proceedings in this action be stayed. Dated this ——— CHAP. XX.
day of ———, 18—.

Yours, &c.

——, defendant's attorney.

To Mr. E. F.

plaintiff's attorney.

Upon reading the joint *affidavit* of G. H. and I. K. It is ordered, that the plaintiffs, and the assignees of the plaintiff I. Y. C., upon notice of this rule, to be given to them respectively, or to their respective attorneys or agents, shall shew cause to this court, on ——— next, why the said assignees should not forthwith appear, and state to this court, the nature and particulars of their claim to the sum of money sought to be recovered from the defendants, by the plaintiffs in this action, and to maintain or relinquish their claim; and why the said defendants should not be paid their costs of and occasioned by this action, and this application, to be taxed by one of the prothonotaries of this court, by such parties as the court may direct: and in the mean time, and until this court shall otherwise order, let all further proceedings in this cause be stayed.

(§ 2.)
Rule nisi
thereon.

Ante, 180, 31.

By the Court.

On the motion of Serjeant }
——, for defendants. }

Cancellor.

Upon reading a rule made in this cause, on ——— last, the *affidavit* of I. Y. C. one of the plaintiffs in this cause, and the *affidavit* of L. M., and upon hearing counsel for the plaintiffs, for the defendants, and for the said L. M. and N. O. the assignees of the estate and effects of the plaintiff I. Y. C.; It is ordered, that all further proceedings in this cause against the defendants be stayed; and that the said plaintiffs, and the said L. M. and N. O. be restrained from proceeding against the said defendants, to recover the dividends for which this action is brought: And it is further ordered, that the said defendants do forthwith pay into the hands of the prothonotaries of this court, the sum of ———*l.*, being the amount of the dividends now due: And it is ordered, that the said L. M. and N. O. do pay to the said defendants, or their attorney, their costs of this action, and also of this application to the court, to be taxed by one of the prothonotaries of this court: And it is further ordered, that the said plaintiffs, and the said L. M. and N. O., as such assignees of the said plaintiff I. Y. C., do proceed

(§ 3.)
Rule absolute,
for trial of right,
on a feigned
issue, &c.
Ante, 180, 31.

CHAP. XX. to try a feigned issue, to inquire whether the shares in the said company, and the dividends thereon, for which this action is brought, are the property of the said plaintiffs, as executors of *F. C.* deceased; in which issue the said plaintiffs are to be plaintiffs, and the said *L. M.* and *N. O.* as such assignees as aforesaid, are to be defendants: the said plaintiffs hereby undertaking to admit, on the trial of such issue, that the said *L. M.* and *N. O.* are assignees of the said plaintiff *I. Y. C.*, a bankrupt: And it is further ordered, that the plaintiffs' costs in this cause, and the costs of the said plaintiffs, and of the said assignees, of this application, do abide the event of the trial of such issue.

By the Court.

Cancellor.

On the motion of Serjeant —, }
for the defendants, Serjeant —, }
for the plaintiffs, and Serjeant —, }
for the said assignees. }

(§ 4.)
Affidavit for obtaining judge's order, on interpleader act, in action against auctioneer, for deposit money.
Ante, 128, &c.

In the King's Bench, &c. (265.)

A. B. plaintiff, &c. (*id.*)

C. D. of —, auctioneer, the defendant in this cause, maketh oath and saith, that he this deponent was, before the commencement of this suit, retained and employed by one *G. H.* to sell by public auction, certain leasehold property, consisting of a dwelling house, (&c.) situate, (&c.); and that he this deponent, in pursuance of such retainer and employment, did, on the — day of — last, put up and expose the said property to sale by public auction; and that on such exposure to sale, the said *A. B.* the plaintiff in this suit, by *E. F.* his agent, became and was the purchaser of the said property, and did deposit, by such agent, in the hands of this deponent, as such auctioneer, the sum of — *l.* as a deposit, and in part payment of the purchase money of the said property. And this deponent further saith, that the said *A. B.* the purchaser of the said property, objects to the title thereof, and refuses to complete the said purchase; and hath brought his action against this deponent, to recover back the said sum of — *l.* so deposited with him as aforesaid. And this deponent further saith, that he this deponent does not claim any interest in the said sum of — *l.*, so being the subject matter of this suit as aforesaid, or any part thereof; but that the right thereto is claimed by the said *G. H.*, the vendor of the said property, who has threatened to sue, and who, this deponent expects, will sue this deponent for the same.

And this deponent further saith, that he does not in any manner collude with the said *G. H.*, but is ready to bring the said sum of —*l.* into court, or to pay or dispose of the same, in such manner as this court, or any judge thereof, may order or direct. CHAP. XX.

Sworn, (&c.)

C. D.

B. } Let the plaintiff's attorney or agent, and also Mr. *G. H.* his
v. } attorney or agent, attend me at my chambers, in *Serjeants'* (§ 5.)
D. } Inn, on — next, at — of the clock, to shew cause, why Summons, to
shew cause
thereon.
an order should not be made for the said *G. H.* to appear, and state *Ante*, 128, &c.
the nature and particulars of his claim to the sum of — *l.*, the
subject matter of this action, and maintain or relinquish such claim;
and why the defendant should not be at liberty to pay the said
sum of — *l.* into court: why it should not be referred to the
master, (*or* prothonotaries,) to tax the defendant's costs of this
action; and why such costs, when taxed, should not be paid to the
defendant, out of the said sum: why all further proceedings in
this action should not be stayed; and why the said *G. H.* should
not be restrained from commencing proceedings against the de-
fendant, in respect of the said sum of — *l.* Dated this — day
of —, 18—.

—, (*Judge's name.*)

B. } Upon hearing the attornies or agents on both sides, and upon (§ 6.)
v. } reading the *affidavit* of *C. D.* I do order, that the defendant Judge's order
thereon.
D. } do retain the sum of — *l.* for a week: also, that Mr. *G. H.* *Ante*, 128, &c.
have a week's time to consider, whether he will defend the action,
or not; if he do not resolve so to do, the money to be paid over
to the plaintiff at that time, with costs, to be taxed and paid by the
present defendant: and also, that Mr. *G. H.* be restrained from
proceeding against the defendant, *C. D.*; and also, that if Mr.
G. H. comes in to defend, he be made defendant, instead of the
present defendant, *C. D.*; and that the plaintiff be at liberty to
amend his declaration: and the present defendant, *C. D.* to have
his costs, from the party ultimately unsuccessful. Dated the —
day of —, 18—.

—, (*Judge's name.*)

CHAP. XXII.

PROCEEDINGS *for* STAYING JUDGMENT, *after* EXECUTION *of* INQUIRY; *and for* ASSESSING DAMAGES,
on STATUTE 8 & 9 W. III. c. 11. § 8.

(§ 1.)

Form of undersheriff's certificate, to be indorsed on writ of inquiry, for staying judgment thereon.

Ante, 132.

I hereby certify, that, in my opinion, judgment ought not to be signed upon this writ, until the defendant shall have had an opportunity to apply to the court of —, to set aside the execution thereof.

—, (*Undersheriff's name.*)

(§ 2.)

The like, where judgment is stayed for a certain number of days only, to give the defendant an opportunity of applying to a judge, or baron.

Ante, 132.

I hereby certify, that, in my opinion, judgment ought not to be signed upon this writ, until the expiration of — days from this — day of —, 18—, that the defendant may have an opportunity, in the mean time, of applying to one of the judges of the court of —, (*or*, “one of the barons of the Exchequer”,) for an order to stay the judgment thereupon, until such day as the said judge (*or*, baron) shall think fit.

—, (*Undersheriff's name.*)

(§ 3.)

Summons for staying judgment, on writ of inquiry executed, until a day in the following term.

Ante, 132.

B. } Let the plaintiff's attorney or agent attend me, at my
v. } chambers, in *Serjeant's Inn*, *Chancery Lane*, to morrow, at
D. } — of the clock in the forenoon, (*or* afternoon,) to shew cause, why the judgment on the writ of inquiry executed in this cause, should not be stayed, until the second day of next — term, or until such day as may be ordered, on the hearing of this summons. Dated the — day of —, 18—.

—, (*Judge's, or Baron's name.*)

(§ 4.)

Judge's, or baron's, order thereon.

Ante, 132.

B. } Upon hearing the attorneys (*or* agents) on both sides, I do
v. } order, that the judgment on the writ of inquiry executed in
D. } this cause, shall be stayed, until the — day of next — term. Dated the — day of —, 18—.

—, (*Judge's, or Baron's name.*)

(*After the declaration in debt on bond, proceed, on a new line, as follows :*) And the said *C. D.* by *G. H.* his attorney, (*or, in his own proper person,*) comes and defends the wrong and injury, when, &c. and says nothing in bar or preclusion of the said action of the said *A. B.*; whereby the said *A. B.* remains therein undefended against the said *C. D.*: wherefore the said *A. B.* ought to recover against the said *C. D.* his debt aforesaid, together with his damages by him sustained, on occasion of the detention thereof, &c. And hereupon the said *A. B.*, according to the form of the statute in such case made and provided, *suggests*, and gives the court here to understand and be informed, that the said writing obligatory, whereon the said judgment was so recovered against the said *C. D.* as aforesaid, was made and given by him the said *C. D.* under and subject to a certain condition thereto subscribed, whereby, after reciting, &c. (*stating the recital, if any, preceding the condition of the bond;*) it was declared, that if, &c. (*reciting the condition :*) And for a breach of the said condition of the said writing obligatory, the said *A. B.* according to the form of the statute in such case made and provided, further suggests, and gives the court here to understand and be informed, that, &c. (*suggesting the breach :*) But because it is convenient and necessary that judgment hereupon should not be given, until the truth of the aforesaid breach of the said condition of the said writing obligatory, above suggested, shall have been inquired into, and the damages which the said *A. B.* hath sustained thereby, shall have been assessed by a jury of the country in that behalf, according to the form of the statute in such case made and provided; therefore let the giving of the said judgment be in the meantime stayed, &c. And the said *A. B.* having prayed the writ of our said lord the king, to be directed to the sheriff of —, to summon a jury to appear before him, to inquire of the truth of the aforesaid breach of the said condition of the said writing obligatory, above suggested, and to assess the damages which the said *A. B.* hath sustained thereby; therefore, according to the form of the statute in such case made and provided, the sheriff is commanded, that he summon twelve free and lawful men of his county, duly qualified

(§ 5.)

Judgment by *nil dicit*, in debt on bond for performance of covenants, where a breach is suggested after judgment, and writ of inquiry awarded, for assessing damages, on stat. 8 & 9 W. III. c. 11. § 8.*

Ante, 135, 6.

Award of writ of inquiry.

* For the mode of beginning the entry of this judgment, in K. B. see Append. to Tidd *Prac.* 9 Ed. Chap. XXII. § 71; and, in C. P. and Exchequer, *id.* § 73; and for the form of a declaration in

debt on bond, before its commencement was altered by the late rule of M. S. W. IV. reg. 15, see *id.* § 72; and for other forms of judgments, on the above statute, *id.* §§ 75, 77, &c.

CH. XXII. according to law, who are in no wise akin to the said *A. B.* or to the said *C. D.*, to appear before the said sheriff, to inquire diligently on their oath, of the truth of the aforesaid breach of the said condition, and to assess the damages which the said *A. B.* hath sustained thereby; and that the said sheriff do send the inquisition which he shall thereupon take, to our said lord the king at *Westminster*, (or, in *C. P.* "to the justices here," or, in the *Exchequer*, "to his majesty's court, before the barons of his Exchequer at *Westminster*,") on the — day of — instant, or next, (*the return day of the writ of inquiry*), under his seal, and the seals of those by whose oath he shall take that inquisition, together with the writ of our said lord the king to him thereupon directed; the same day is given to the said *A. B.* &c.: At which day, before our said lord the king at *Westminster*, comes (or, in *C. P.* and *Exchequer*, "At which day comes here,") the said *A. B.* by his attorney aforesaid: and the sheriff, to wit, — Esquire, sheriff of — aforesaid, now here returns, a certain inquisition indented, and annexed to the said writ, taken before him, at —, in the county aforesaid, on the — day of —, in the — year of the reign of our said lord the king, by the oath of twelve free and lawful men of his county; by which it is found, that the breach of the condition of the said writing obligatory, in the said writ mentioned, is true, and that the said *A. B.* hath sustained damages, by the aforesaid breach of the said condition, besides his costs and charges by him about his suit in this behalf expended, to —*l.*, and for those costs and charges to — shillings. Therefore it is considered, that the said *A. B.* do recover against the said *C. D.* his said debt, and also 1*s.* for his damages which he hath sustained, on occasion of the detention thereof, &c. It is also considered, that the said *A. B.* do recover against the said *C. D.* his costs and charges aforesaid, by the said inquisition above found, and also —*l.* for his said costs and charges, by the court of our said lord the king now here (*in K. B.*; or in *C. P.* or *Exchequer*, "before the justices, or barons here") adjudged of increase to the said *A. B.*, and with his assent; and the said *C. D.* in mercy, &c.

Return thereto, and final judgment.

Judgment signed the — day of —, 1*s.*—.

Mercy.

(§ 6.)
Writ of inquiry,
for assessing da-
mages thereon.*
Ante, 135, 6.

William the Fourth, &c. (262). To the sheriff of —, greeting:
Whereas *A. B.* lately in our court before us, (*in K. B.*; or, in *C. P.* "before our justices," or, in the *Exchequer*, "before the

* For other forms of writs of inquiry, *Append. to Tidd Prac.* 9 Ed. Chap. XXII. §§ 80, 82, 3.
for assessing damages, in *debt* on bond
for performance of covenants, &c. see

Barons of our Exchequer") at *Westminster*, impleaded *C. D.* in an action of *debt*, and demanded of him the sum of — *l.* of good and lawful money of *Great Britain*, upon and by virtue of a certain writing obligatory, in the penal sum of — *l.*, bearing date, &c. (*date of bond*), and sealed with the seal of the said *C. D.* And such proceedings were thereupon had, in our said court before us, &c. (*as above*), that it was afterwards considered by the same court, that the said *A. B.* ought to recover against the said *C. D.* his debt aforesaid, together with his damages which he had sustained on occasion of the detention thereof, &c.; whereof the said *C. D.* is convicted, as appears to us of record: And thereupon the said *A. B.* according to the form of the statute in such case made and provided, suggested upon the roll whereon the said judgment, so recovered against the said *C. D.* as aforesaid, is entered, to the effect following, to wit: that the said writing obligatory, whereon the said judgment was so recovered against the said *C. D.* as aforesaid, was made and given by him the said *C. D.*, under and subject to a certain condition thereto subscribed; whereby, after reciting, &c. (*stating the recital, if any, preceding the condition of the bond*), it was declared, that if, &c. (*stating the condition*.) And the said *A. B.* further suggested on the said roll, whereon the said judgment so recovered against the said *C. D.* was and is so entered as aforesaid, that, &c. (*here state the suggestion of a breach, to the prayer of a writ of inquiry, and then proceed as follows*;) as we have received information from the said *A. B.* in our said court before us, &c. (*as above*): And the said *A. B.* having prayed our writ, to inquire of the truth of the aforesaid breach of the said condition of the said writing obligatory, above suggested, and to assess the damages which he the said *A. B.* hath sustained thereby; therefore, according to the form of the statute in such case made and provided, we command you the said sheriff, that you summon twelve free and lawful men of your county, duly qualified according to law, who are in no wise akin either to the said *A. B.* or to the said *C. D.* to appear before you the said sheriff, to inquire diligently on their oath, of the truth of the aforesaid breach of the condition of the said writing obligatory, above suggested, and to assess the damages which the said *A. B.* hath sustained thereby; and that you send to us, &c. (*as above*), on the — day of — instant, or "next", (*the return day of the writ of inquiry, allowing sufficient time for giving notice of its execution*), the inquisition which you shall thereupon take, under your seal, and the seals of those by whose oath

CH. XXII. you shall take that inquisition, together with this writ. Witness, &c. (263.)

(§ 7.)
Notice of inquiry, and assessment of damages, on stat. 8 & 9 W. III. c. 11. § 8.
Ante, 136.

In the King's Bench, &c. (265.) *A. B.* plaintiff, &c. (*id.*)

Take notice, that a writ of inquiry will be executed in this cause, on —, the — day of — instant, (*or next*), at the secondaries office, No. 5, *Basinghall Street, London*, (*or*, “at the house, known by the name of the sheriff's office, in *Red Lion Square*, in the county of *Middlesex*”; *or, if in the country*, “at the house of —, commonly called or known by the name or sign of —, in — street, at —, in the county of —,”) to inquire of the truth of the breach suggested by the plaintiff, of the condition of the writing obligatory mentioned in the declaration in this cause, and to assess the damages which the said plaintiff hath sustained thereby: (*and, if the plaintiff mean to attend by counsel, add “when and where counsel will attend, on behalf of the said plaintiff.”*) Dated the — day of —, 18—.

Your's &c.

E. F. plaintiff's attorney, (*or agent.*)

To Mr. *G. H.* defendant's }
attorney, (*or agent.*) }

(§ 8.)
Inquisition, and return, on same statute.
Ante, 136.

— (to wit.) An inquisition indented, taken at the secondaries office, &c. (*as in last*), on —, the — day of —, in the — year of the reign of our sovereign lord *William* the Fourth, by the grace of God, of the united kingdom of *Great Britain and Ireland* king, defender of the faith, before — and — Esquires, sheriffs of *London* aforesaid, (*or*, “before —, sheriff of the county aforesaid,”) by virtue of a writ of our said lord the king, directed and delivered to the said sheriffs, (*or sheriff*), and to this inquisition annexed, to inquire of the truth of the within mentioned breach of the condition of the within mentioned writing obligatory, and to assess the damages which the within named *A. B.* hath sustained thereby, by the oath of twelve free and lawful men of the said city, (*or county*), who, being sworn and charged, upon their oath say, that the said breach of the said condition is true, and that the said *A. B.* hath sustained damages, by the aforesaid breach of the said condition, besides his costs and charges by him about his suit in this behalf expended, to —*l.* and for those costs and charges to —. In witness whereof, we the said sheriffs have hereunto set our

hands (*or* "I the said sheriff have hereunto set my hand") and CH. XXII.
seal, the day and year, and at the place above mentioned.

The execution of this writ appears in the inquisition hereunto Return.
annexed.

The answer of — and —, sheriffs; (*or* "of —, sheriff.")

CHAP. XXIV.

RULES *for* CHANGING VENUE.

In the Common Pleas.

— term, &c. (267.)

(§ 1.)

B. } Upon reading the *affidavit* of C. D. the defendant, and on
v. } inspecting the plaintiff's declaration in this cause; It is
D. } ordered, that this action be laid in the county of —; and
that all further proceedings in the county of —, be stayed.

Rule for chang-
ing venue, in
C. P.*
Ante, 137.

On the motion of Serjeant —, }
for the defendant.

By the Court.

In the Exchequer of Pleas.

— term, &c. (267.)

(§ 2.)

B. } Upon the motion of Mr. —, of counsel for the defendant,
v. } and reading the declaration in this cause, and the *affidavit* of
D. } the defendant; It is ordered, that the venue in this cause be
changed, from the county of —, to the county of —.

The like, in the
Exchequer.
Ante, 137.

By the Court.

* For the rule to change the venue, in Chap. XXIV. § 2.
K. B. see Append. to Tidd *Prac.* 9 Ed.

CHAP. XXX.

ISSUE.

(§ 1.)
Issue, of same
term with de-
claration.

Ante, 150, 51.

— day of —, in the year of our Lord 18—.
(*as in the declaration.*)

— (*Venue.*) *A. B.* by *E. F.* his attorney, (*or*, “in his own proper person,”) complains of *C. D.* who has been summoned to answer, &c. (*or*, “who has been arrested,” &c. *or*, *against a prisoner*, “being detained, &c.” *as in the declaration.*) For that where-
as, &c. (*copying the declaration, to the end.*)

Award of *venire*
facias.
Ante, 152, 156.

And the said *C. D.* by — his attorney, (*or*, “in his own proper person,”) comes and defends the wrong and injury, when, &c. and says, &c. (*copying the pleadings, in their proper order, beginning each with a new line.*) Therefore (*in the King's Bench*), let a jury thereupon come (*or, if there are several issues*, “Therefore, as well try this issue, as the said other issue (*or issues*) above joined between the parties aforesaid, let a jury thereupon come”) forthwith, before our lord the king at *Westminster*, by whom, &c. and who neither, &c. to recognize, &c. because as well, &c.; (*or, in the Common Pleas*, “The sheriff is commanded, that he cause to come here forthwith, twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c.”; *or, in the Exchequer*, “Therefore to try the issue, or issues, aforesaid, between the parties aforesaid above joined, let a jury be made thereof.”)

(§ 2.)
The like, of a
subsequent term.
Ante, 151, 2.

— day of — in the year of our Lord 18—.
(*the day on which the issue is made up.*)

— (*Venue.*) *A. B.* on the — day of —, in the year of our Lord 18—, (*the day on which the declaration was delivered or filed*), by *E. F.* his attorney, (*or* “in his own proper person,”) complained of *C. D.* who had been summoned to answer, &c., (*or* “who had been arrested,” &c.; *or, against a prisoner*, “who was detained,” &c. *as in the declaration*), as follows, that is to say: — day of —, in the year of our Lord 18—. — (*Venue.*) *A. B.* by *E. F.* his attorney, (*or*, “in his own proper person,”) complains of *C. D.* &c. (*copying the declaration, to the end.*)

And the said *C. D.* by *G. H.* his attorney, (*or*, “in his own proper person,”) comes and defends, &c. (*as in last, to the end.*)

CHAP. XXXIII.

PROCEEDINGS *for TRIAL of ISSUES,*
before SHERIFF, &c.

In the King's Bench, &c. (265.)

A. B. plaintiff, &c. (*id.*)(\$ *a.*)

E. F. of —, gentleman, attorney for the above named plaintiff, maketh oath and saith, that the sum sought to be recovered, and indorsed on the writ of *summons*, in this action, does not exceed *twenty* pounds: And this deponent further saith, that issue has (*or*, “issues have”) been joined in the said action; and that the trial will not, as this deponent verily believes, involve any difficult question of fact or law.

Affidavit, to obtain judge's order for writ of trial, on stat. 3 & 4 W. IV. c. 42. § 17.

Ante, 152, 3.

Sworn, (&c.)

E. F.

B. } Let the defendant's attorney, or agent, attend me, at my
v. } chambers in *Serjeant's Inn*, tomorrow, at — of the clock in
D. } the forenoon, (*or* afternoon,) to shew cause, why a writ should not issue, directed to the sheriff of —, commanding him to summon a jury, to try the issue (*or*, issues) joined in this cause, pursuant to the statute 3 & 4 W. IV. c. 42. Dated the — day of — 18—.

(\$ *b.*)

Summons thereon.

Ante, 152, 3.—, (*Judge's*, *or Baron's name.*)

Let the defendant's attorney, or agent, attend me, at my chambers, &c. (*as in last*), to shew cause, why the issue (*or*, issues) joined in this cause, should not be tried before the sheriff of —, being the county where the action is brought; and why a writ should not issue, directed to the said sheriff, commanding him to summon a jury, to try such issue, (*or*, issues,) and to return the same to the court, on some day certain, to be named in such writ, together with the finding of the jury indorsed thereon, pursuant to the statute 3 & 4 W. IV. c. 42. Dated, &c. (*as in last*.)

(\$ *c.*)

The like, another way.

Ante, 152, 3.

In the King's Bench, &c. (265.)

B. } Upon reading the *affidavit* of *E. F.* and hearing the attorneys
v. } or agents on both sides; I order, that the issue (*or*, issues)
D. } joined in this cause, be tried before the sheriff of —; and that a writ do issue, directed to the said sheriff, commanding him

(\$ 1.)

Judge's order thereon.

Ante, 152, 3.

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XXXIII.

to summon a jury, to try such issue, (*or, issues,*) and to return the same to the court, on some day certain, to be named in such writ, together with the finding of the jury indorsed thereon, pursuant to the statute in that case made and provided. Dated, &c. (307.)

(§ 1. a.)
The like, to
judge of sheriff's
court, in *Lon-*
don.
Ante, 152, 3,

B. } Upon reading the *affidavit* of *E. F.* and hearing the attor-
v. } nies or agents on both sides; I do order, that the issue (*or,*
D. } issues) joined in this cause, be tried before the judge of the
sheriff's court^a, in the city of *London*; and that a writ do issue, directed to the sheriffs of *London*, commanding them to summon a jury, to try such issue, (*or, issues,*) before the same judge, pursuant to the statute 3 & 4 W. IV. c. 42, on a day certain, to be named in such writ. Dated, &c. (307.)

(§ 2.)
Form of writ of
trial.
Ante, 153, 4.

William the Fourth, &c. (262.) To the sheriff of —, greeting: Whereas *A. B.* (*the plaintiff,*) in our court before us, (*in K. B.; or, in C. P.,* "before our justices," *or, in the Exchequer,* "before the barons of our Exchequer,") at *Westminster*, on the — day of — last, (*the date of the writ of summons,*) impleaded *C. D.* (*the defendant,*) in an action on promises, (*or, of debt, &c. as the case may be;*) for that whereas the defendant, on the — day of —, &c. (*set forth the declaration, plea, and issue, or issues, joined:*) And whereas the sum sought to be recovered in the said suit, and indorsed on the writ of *summons*, does not exceed *twenty* pounds; and it is fitting, that the said issue (*or, issues*) above joined, should be tried before the said sheriff of —. We, therefore, according to the form of the statute in such case made and provided, command you, that you do summon twelve free and lawful men of your county, duly qualified according to law, who are in no-wise akin to the plaintiff, or to the defendant, who shall be sworn truly to try the issue (*or, issues*) above joined between the parties aforesaid^b; and that you proceed to try such issue (*or, issues*) accordingly: and, when the same shall have been tried in manner afore-

^a In *London*, there are two sheriffs, each of whom holds a court of record, for all personal actions arising within the city: These courts are kept at *Guild-hall*; and in each court, it is said, a steward is the judge. Bac. Abr. tit. *Courts in London*, 2. Com. Dig. tit. *Courts*, O. 4. and see 4 Inst. 248. Bo-

hun *Priv. Lond.* 264.

^b It has been said, that this writ should be, as well to try the issue or issues joined between the parties, as to assess the damages which the plaintiff hath sustained, in case the issue, *or issues*, shall be found for him; but there does not seem to be any ground for this objection;

said, we command you, that you make known to us, (in *K. B.*; or, in *C. P.* "to our said justices," or, in the *Exchequer* "to the barons of our said Exchequer,") what shall have been done by virtue of this writ, with the finding of the jury thereon indorsed, on — the — day of — instant, (or next,) that judgment may be given thereupon. Witness, &c. (263).

E. F. attorney for the plaintiff,

G. H. attorney for the defendant.

By order of —, (*judge's, or baron's name,*)

dated the — day of —, 18—.

In the King's Bench, &c. (265.)

B. }
v. } Writ of Trial.
D. }

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(§ 3.)
Indorsement
thereon, before
delivery to she-
riff.

Ante, 154.

To be tried at the Secondaries office, 5, *Basinghall Street*, London; (if in London; or, if in *Middlesex*, "at the house known by the name of the sheriff's office, in *Red Lion Square*"; or, in the country, "at the house of —, commonly called or known by the name or sign of —, in — street, at — in the county of —,) on — the — day of — 183—, at — of the clock, precisely.

E. F. plaintiff's attorney, or agent; (*stating his residence.*)

In the King's Bench, &c. (265.)

A. B. plaintiff, (*id.*)

Take notice, that the issue (or issues) joined between the parties in this cause, will be tried before the sheriffs of London, (if in London; or, in *Middlesex*, "before the sheriff of the county of *Middlesex*"; or, in any other county, or city, "before the sheriff of —,") in pursuance of the order of the Lord Chief Justice, (or, Mr. Justice —; or, in the *Exchequer*, "before the Lord Chief Baron, or, Mr. Baron —,") at the Secondaries office, &c. (*as in last*,) on —, the — day of — instant, (or "next,") at — of the clock, precisely, (*the hour fixed for the sitting of the court.*)

(§ 4.)
Notice of exe-
cuting writ of
trial.

Ante, 154.

Your's &c.

E. F. plaintiff's attorney, &c. (*as in last.*)

To Mr. *G. H.*

defendant's attorney, (or agent.)

as the writ is framed in the language of the act, and seems to be good, by analogy to trials at *nisi prius*, where the jury process is awarded and issued, and the jury

sworn, to try the issue or issues generally; and the assessment of damages follows of course, on their finding a verdict for the plaintiff.

(§ 5.)
Return thereto,
in *assumpsit*.
Ante, 154.

——. By virtue of this writ, to me directed, afterwards, to wit, on ——, the —— day of ——, in the —— year of the reign of our sovereign lord king *William* the Fourth, before me ——, sheriff of the county of ——, at the house, &c. (*as in § 3.*) come as well the within named plaintiff, as the within named defendant, by their respective attornies within named; and the jurors of the jury, by me the said sheriff duly summoned to try the issue (*or issues*) within mentioned, to wit, &c. (*naming the jurors*), twelve free and lawful men of my said county, duly qualified according to law, who are in no wise akin to the said plaintiff, or to the said defendant, also come; who, being sworn truly to try the said issue, (*or issues*), upon their oath say,* that the said defendant did undertake and promise, in manner and form as the said plaintiff hath within complained against him; (*and, if there were several issues, there should be a finding on each of them :*) and they assess the damages of the said plaintiff, on occasion of the not performing of the promises and undertakings within mentioned, over and above his costs and charges by him about his suit in this behalf expended, to ——*l.* and for those costs and charges to 40*s.*

——, sheriff.

(§ 6.)
The like, in *debt*,
where part is
found for plain-
tiff, and part for
defendant.
Ante, 154.

(*As in the last, to the asterisk, and then as follows :*) that the said defendant doth owe to the said plaintiff, the sum of ——*l.* parcel of the sum within demanded; and, as to the residue thereof, that the said defendant doth not owe the same, or any part thereof, in manner and form as the said plaintiff hath within alleged: And they assess the damages of the said plaintiff, by reason of the detention of the said sum of ——*l.* parcel, &c. over and above his costs and charges by him about his suit in this behalf expended, to 1*s.* and for those costs and charges, to 40*s.*

——, sheriff.

(§ 7.)
Entry of pro-
ceedings, and
judgment in *as-
sumpsit*, on ver-
dict for plaintiff.
Ante, 154.

(*To the end of the issue, or issues, and then as follows :*) And thereupon afterwards, and before any further proceedings were had for the trial of the said issue, (*or issues*), above joined between the parties aforesaid, to wit, on the —— day of ——, in the year of our Lord 18—, (*date of judge's order*), a certain order was made in the said cause, by the right honourable ——, chief justice, (*or "the honourable Mr. Justice ——," in K. B. or C. P.; or, in the Exchequer, "by the right honourable ——, lord chief baron," or "the honourable Mr. Baron ——,"*) dated the day and year last aforesaid,

whereby, upon reading the *affidavit* of *E. F.* and hearing the attornies or agents on both sides, it was ordered, &c. (*reciting the order for the writ of trial*;) as by the information of the said *A. B.*, in the same court, our said lord the king had been given to understand: And the said plaintiff having prayed the writ of our said lord the king, to be directed to the sheriff of — aforesaid, for the trial of the said issue, (*or issues*;) according to the form of the statute aforesaid, the said sheriff is commanded, that he summon twelve free and lawful men of his county, duly qualified according to law, who are in no wise akin to the said plaintiff, or to the said defendant, who shall be sworn truly to try the issue (*or issues*) joined between the parties aforesaid; and that he proceed to try such issue (*or issues*) accordingly: and, when the same shall have been tried in manner aforesaid, that he make known to our said lord the king at *Westminster*, (*in K. B.*; *or, in C. P.* “to the justices here,” *or, in the Exchequer*, “to the barons of his said majesty’s Exchequer at Westminster aforesaid,”) what shall have been done, by virtue of the said writ, with the finding of the jury thereon indorsed, on the — day of — instant, (*or, next*;) the same day is given to the parties aforesaid, &c. At which day, before our said lord the king at *Westminster*, come (*or, in C. P. or Exchequer*, “At which day come here,”) the parties aforesaid, by their attornies aforesaid; and the sheriff, to wit —, sheriff of — aforesaid, now here returns, that by virtue of the said writ to him directed, afterwards, to wit, on —, the — day of —, in the — year of the reign of our said lord the king, before the said sheriff, at the house, &c. (*as in the return*;) came as well the said plaintiff as the said defendant, by their respective attornies aforesaid; and the jurors of the jury, by the said sheriff duly summoned to try the issue (*or issues*) in the said writ mentioned, to wit, (*names of the jurors*;) twelve free and lawful men of the said county, duly qualified according to law, who are in no wise akin to the said plaintiff, or to the said defendant, also came, who being sworn truly to try the said issue, (*or issues*;) upon their oath* said, that the said defendant did undertake and promise, in manner and form as the said plaintiff had complained against him: and they assessed the damages of the said plaintiff, on occasion of the not performing of the promises and undertakings in the said declaration mentioned, over and above his costs and charges by him about his suit in that behalf expended, to — *l.* and for those costs and charges to 40*s.*; and which finding of

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XXXIII.

Judgment
signed the —
day of —,
18—.

Mercy.

(§ 8.)
The like in *debt*,
where part is
found for the
plaintiff, and part
for the de-
fendant.
Ante, 154.

Judgment
signed the —
day of —,
18—.

Mercy.

the said jury was and is indorsed on the said writ, according to the exigency thereof, and the statute in such case made and provided: And hereupon the said plaintiff prays the judgment of the court here, of and upon the premises. Therefore it is considered, that the said plaintiff do recover against the said defendant, his damages aforesaid, by the said jury above found, and also — *l.* for his said costs and charges, by the court of our said lord the king now here, (*in K. B. or Exchequer; or, in C. P. "by the justices here"*) adjudged of increase to the said plaintiff, and with his assent; which said damages, costs and charges, in the whole amount to — *l.* and the said defendant in mercy, &c.

(*As in the last, to the end of the award of the writ of trial, and then as follows:*) At which day, before our said lord the king at Westminster, come (*or, in C. P. or Exchequer, "At which day come here,"*) the parties aforesaid, by their attornies aforesaid; and the sheriff, to wit, —, sheriff of — aforesaid, now here returns, that by virtue of the said writ, &c. (*as in last, to the asterisk, and then as follows:*) said, that the said defendant did owe to the said plaintiff, the sum of — *l.* parcel of the said sum of — *l.* above demanded; and, as to the residue thereof, that the said defendant did not owe the same, or any part thereof, in manner and form as the said plaintiff had alleged: and they assessed the damages of the said plaintiff, by reason of the detention of the said sum of — *l.* parcel of the said sum of — *l.* above demanded, over and above his costs and charges by him about his suit in that behalf expended, to 1*s.* and for those costs and charges to 40*s.*; and which finding, &c. (*as in last, to the judgment, which is as follows:*) Therefore it is considered, that the said *A. B.* do recover against the said *C. D.* the said sum of — *l.* parcel, &c. and his damages aforesaid, to 1*s.*, together with his costs and charges aforesaid, to 40*s.*, by the said jury above found, and also — *l.* for his said costs and charges, by the court of our said lord the king now here (*in K. B. or Exchequer; or, in C. P. "by the justices here"*) adjudged of increase to the said *A. B.* and with his assent; and the said *C. D.* in mercy, &c.: and let the said *A. B.* be in mercy, for his false complaint against the said *C. D.* for the residue of the said sum of — *l.* above demanded, whereof the said *C. D.* is acquitted; and the said *C. D.* go thereof without day, &c.

CHAP. XXXV.

PROCEEDINGS *by* MANDAMUS, RULE *or* ORDER, *and*
 COMMISSION, *for* EXAMINATION *of* WITNESSES,
on INTERROGATORIES, &c.

In the King's Bench.

— the — day of —, &c. (267.)

B. } Upon reading the order of the honorable Mr. Justice —,
 v. } dated the — day of —, 18—; and the parties hereby
 D. } undertaking respectively, that this rule, drawn up on the au-
 thority of the above order, shall be of the same force and effect
 as if the same had been made in open court, upon hearing counsel
 for both parties; It is ordered, that a writ, in the nature of a
mandamus or commission, issue, directed to the chief justice and
 the other judges of the supreme court of judicature, at *Sydney* in
New South Wales, commanding them the said chief justice and
 other judges, to hold a court for the examination, *viâ voce*, of
 witnesses in this cause, on the part of the defendant, and for re-
 ceiving other proofs therein, pursuant to the statute of the thirteenth-
 year of King *George* the third, chap. 63, and the first of his present
 Majesty, chap. 22; and also commanding them the said chief
 justice and other judges, to do and perform all such matters and
 things, relative thereto, as by the said statutes respectively are re-
 quired: And it is further ordered, that the said writ, and the
 proceedings thereunder, be transmitted, under the seal of the said
 court, to *Charles Short* Esquire, clerk of the rules and orders on
 the plea side of this court, and be permitted to be read, and given
 in evidence, on the trial of this cause, saving all just exceptions:
 And it is also ordered, that the trial of the issue in this cause
 be put off, until the return of the said writ, or until this court shall
 otherwise order; and that the costs of the said writ and ex-
 amination, and incidental thereto, be costs in the cause.

By the Court.

William the Fourth, &c. (262.) To — chief justice, and —
 and —, judges of his majesty's supreme court of judicature at

(§ 1.)
 Rule for *man-*
damus, in K. B.,
 founded on a
 judge's order, to
 examine wit-
 nesses in *New*
South Wales.
Ante, 161.

(§ 2.)
 Writ of *man-*
damus, to ex-
 amine witnesses

in *India*, or
the colonies,
&c. on stat. 19
Geo. III. c. 69.
& 1 W. IV.
c. 22.*

Anne, 161.

Fort William, Bengal, in the East Indies, (or, if the writ be directed to the judges of any other of his majesty's colonies, &c. in foreign parts, they should be accurately described,) and to every of them, greeting: Whereas *A. B.* hath lately in our court before us, (*in K. B.; or, in C. P., "before our justices," or, in the Exchequer, "before the barons of our Exchequer,"*) at *Westminster*, commenced and prosecuted a certain action at law against *C. D.* for the recovery of his damages, by him alleged to be sustained, on occasion of the nonperformance of certain promises and undertakings, heretofore alleged to have been made by the said *C. D.* to the said *A. B.*, (*or otherwise, according to the nature of the cause of action;*) and which said action is yet depending in our said court before us (*in K. B.; or, in C. P., "before our said justices;" or, in the Exchequer, "before the barons of our said Exchequer,"*) at *Westminster*: And whereas, on the part of the said *A. B.* (*or C. D.*) we have been given to understand and be informed, that the said *A. B.* is unable conveniently to proceed to the trial of (*or "the said C. D. to defend"*) the said cause, by reason of the difficulty of proving, in this kingdom, divers matters and things relating to the said cause, by witnesses residing within the jurisdiction of your said court: And whereas the said *A. B.* (*or C. D.*) hath besought us to award him our writ in this behalf, to you the chief justice and judges of the said supreme court of judicature, (*or other court, describing the judges thereof,*) to be directed, for the examination of witnesses resident within the jurisdiction of your said court, according to the form and effect of the statutes in such case made and provided: We therefore, being willing that the said *A. B.* (*or C. D.*) should have all proper benefit of the provisions of the said statutes, and that due and speedy justice, should be done in the premises, do command you the said chief justice, and judges of the said supreme court of judicature, (*or other court, describing the judges thereof,*) that you do, with all convenient speed, hold a court for the examination of witnesses in this cause; and that you do perform all such other matters and things in this behalf, as by the directions of the said statutes you are required to do and perform: and how you shall have executed this our writ, make known to us, (*in K. B.; or, in C. P. "to our said justices;" or, in the*

* This writ, it will be observed, so far as it relates to the examination of witnesses in *India*, is similar to that in Appendix to Tidd *Prac.* 9 Ed. Chap. XXXV.

§ 27, except that it does not state the cause of action to have arisen in that country.

Exchequer, "to the barons of our said Exchequer,") at *Westminster* aforesaid, with all convenient speed, at the same time returning to us (in *K. B.*; or, in *C. P.* or *Exchequer*, "to our said justices, or barons,") the examination which you shall have taken by virtue of this our writ, together with this writ. Witness, &c. (263.)

In the King's Bench, &c. (265.)

A. B. plaintiff, &c. (*id.*)

A. B. of —, the above named plaintiff, maketh oath and saith, that this action hath been brought, and is now depending, for the recovery of, &c. (*stating cause of action concisely*): And this deponent further saith, that *G. H.* is a material and necessary witness for this deponent, in the said action; and that, without the testimony of the said *G. H.*, this deponent is advised and believes, that he cannot safely proceed to the trial of this cause: And this deponent further saith, that the said *G. H.* is about to leave this kingdom, very shortly, for —, in parts beyond the seas, and is not expected to return for a considerable length of time, as this deponent hath also been informed and verily believes: (*or*, "that the said *G. H.* is dangerously ill, or very old and infirm," &c. *according to the fact.*)

Sworn, (&c.)

A. B.

(§ 8.)
Affidavit to obtain judge's order, for examination of a witness who is going abroad, &c. on interrogatories.

Ante, 162.

B. } Upon hearing the attornies or agents on both sides, and by
v. } virtue and authority of the statute lately made and provided
D. } in this behalf; I order, that *G. H.*, a witness on behalf of the plaintiff, and now within the jurisdiction of this court, shall and may be examined upon interrogatories, to be exhibited to him, either at his own house at —, in the county of —, on the day next after the end of the next assizes, to be holden for the county of —, or at such other time or place as shall be previously agreed upon between the parties, before *I. K.* and *L. M.*, of —, gentlemen, commissioners on behalf of the plaintiff, and *N. O.* and *P. Q.* of —, gentlemen, commissioners on behalf of the defendant, or any three of them: And I further order, that — days before the time appointed for such intended examination, the plaintiff's attorney do deliver to the defendant's attorney, a copy of the interrogatories, so intended to be exhibited as aforesaid; and that the defendant be at liberty to cross-examine the said

(§ 4.)
Judge's order, to examine witness on interrogatories, before commissioners in the country.

Ante, 162.

CH. XXXV. witness upon cross interrogatories, to be exhibited in like manner; and that the costs of such examination, and cross examination, be costs in the cause. Dated the — day of —, 18—. —, (*Judge's, or Baron's name.*)

(§ 5.)
Special order in
Exchequer, for
examination of
witnesses *vid
voce*, within the
jurisdiction; au-
thorizing the ex-
aminer to report
thereon speci-
ally, if neces-
sary.

Ante, 162.

Price Excheq.
Addend. 553, 4.

B. } Upon hearing the attornies or agents on both sides, and by
v. } their consent, and by virtue and authority of the statute
D. } lately made and provided in this behalf, I do order, that *E. F.*
and *G. H.* witnesses on behalf of the above-named plaintiff, and now
within the jurisdiction of this court, shall and may be severally and
respectively examined upon oath, before Mr. Serjeant —, (*or*
“ — Esquire, barrister-at-law,” *or* “ — gentleman,” &c.) And
I do further order and direct, that the said witnesses may be ex-
amined in chief by counsel, or by the attorney for and on behalf
of the said plaintiff, and may be examined by counsel, or by the
attorney, for and on behalf of the said defendant, and who may be
examined by the said —, (*examiner's name*), as he shall think
fit; and that such examination shall be had and taken *vid voce*,
and not upon interrogatories; the said several witnesses being first
duly sworn, or making affirmation, in cases where such affirmation
is allowed by law instead of oath, before me, or some other baron
of this court: And, by the like authority, I do further order, that
it shall and may be lawful for the said —, (*name of examiner*),
and I do hereby require him to make, if need shall be, a special
report, touching the examinations hereby directed, and the conduct
or absence of all or any of the said several witnesses: And lastly,
by the like consent and authority, I do further order and direct,
that the said examination, so to be taken as aforesaid, shall be
without delay returned to my chambers, certified under the hand
and seal of the said —, (*examiner's name*). Dated, &c. (*as in
last*).

—, (*Baron's name.*)

(§ 6.)
Notice of time
and place ap-
pointed for ex-
amination of wit-
ness, on inter-
rogatories.

Ante, 164.

In the King's Bench, &c. (265.) *A. B.* plaintiff, &c. (*id.*)
Take notice, that —, the examiner duly appointed by rule of
his Majesty's court of —, or by order of the honourable Mr.
justice (*or baron*) —, bearing date, (&c.) will attend to-morrow,
the — day of — instant, (*or* “on — the — day of —
instant, *or next*,”) at the house of —, situate, (&c.) at — of
the clock in the forenoon precisely, for the purpose of examining
G. H. a witness, for and on behalf of the plaintiff (*or defendant*) in

this cause, upon interrogatories, pursuant to the said rule (or order) CH. XXXV.

Dated, &c. (§ 4.)

Yours, &c.

To Mr. *E. F.* (or *G. H.*)

G. H. (or *E. F.*)

plaintiff's (or defendant's)

defendant's (or plaintiff's)

attorney.

attorney.

— *Habeas corpus* to testify, before examiner, between *A. B.* plaintiff, and *C. D.* defendant, on the part of the plaintiff, (or defendant.)

E. F. attorney.

(§ 7.)
*Præcipe for
habeas corpus
ad testificandum.*
Ante, 163.

— 18 —

William the Fourth, &c. (262.) To the sheriff of —, (or, "To the marshal of our prison of the Marshalsea," or, "warden of our prison of the *Fleet*," or other officer in whose custody the prisoner is,) greeting: We command you, that you have the body of *I. K.* detained in our prison, under your custody, as it is said, under safe and secure conduct, before —, the examiner duly appointed by rule of our court before us, (in *K. B.*; or, in *C. P.* "before our justices," or, in the *Exchequer*, "before the barons of our *Exchequer*," at *Westminster*; or, if by judge's order, "by order of the right honourable —, our chief justice, or chief baron, or the honourable —, one of the justices, or barons, of our said court,") at the master's, or prothonotaries', office, in the *Inner Temple, London*; (or, "in the office of the *Exchequer of Pleas*, in *Lincoln's Inn*;" or, "at the house of —, situate," &c.) on — the — day of — instant, (or next,) by — of the clock in the forenoon of the same day, (the time and place appointed by the examiner;) then and there to testify the truth, according to his knowledge, in a certain cause now depending in our said court before us, (in *K. B.*; or, in *C. P.* "before our said justices," or, in the *Exchequer*, "before the barons of our said *Exchequer*,") between *A. B.* plaintiff and *C. D.* defendant, in an action on promises, (or "of debt," &c. as the case may be,) on the part of the said plaintiff, (or defendant): and immediately after the said *E. F.* shall have given his testimony before the said examiner, that you return him the said *E. F.* to our said prison, under safe and secure conduct; and have there then (or, in *C. P.* and *Exchequer*, "have there") this writ. Witness, &c. (263.)

(§ 8.)
*Writ of habeas
corpus ad
testificandum.*
Ante, 163.

(§ 9.)

Rule absolute, in K. B. for commission to examine witnesses abroad.

Ante, 164, 5.

In the King's Bench.

— the — day of —, &c. (267.)

B. } Upon reading the *affidavit*, (&c.) It is ordered, that a com-
v. } mission issue, directed to — and —, commissioners named
D. } on the part of the plaintiff, and — and —, commissioners
named on the part of the defendant, for the examination, *de bene esse*, of such of the defendant's witnesses as are resident in the kingdom of *France*, upon interrogatories, to be exhibited to them at *Paris*, before the said commissioners, or any three or two of them, so as that one commissioner at least for each of the parties respectively be present at such examination; and also empowering and requiring the said commissioners, or any three or two of them as aforesaid, to perform all such matters and things, as are required and authorized by the statute of the first year of his present Majesty, chap. 22; And it is further ordered, that the plaintiff be at liberty to cross-examine, upon oath as aforesaid, the said witnesses, upon interrogatories to be exhibited to them as aforesaid; and for that purpose, that the defendant do deliver to the plaintiff, or his attorney, a copy of the interrogatories in chief, — days before the sending out of the said commission; and that — days' notice of the time and place of holding the said examination, be given to the plaintiff's appointed agent there: And it is further ordered, that the said commission, with the several proceedings taken thereunder, be transmitted, under the seals of such of the commissioners as shall execute the same, to *Charles Short*, Esq. clerk of the rules and orders on the plea side of this court, and be permitted to be read and given in evidence, on the trial of this cause, saving all just exceptions.

By the Court.

(§ 10.)

Rule to shew cause, in Exchequer, why a commission should not issue, for examination of witnesses in *France*.

Ante, 164, 5.

In the Exchequer of Pleas.

— term, &c. (267.)

Duckett, Baronet, against *Williams* Esq.*

— the } Upon the motion of Mr. —, of counsel for the
— day } defendant, and reading the *affidavit* of *G. H.*; It is
of —. } ordered, that the plaintiff shew cause, on —, the —

* This case is reported in 1 *Crompt. & J.* 510. 1 *Tyr. Rep.* 502. 1 *Price N. R.* 40. 1 *Dowl. Rep.* 291. S. C. And for the form of the *affidavit*, in support of the motion for a commission in this case, see *Price Excheq. Addend.* 559, 60; and of a baron's order thereon, *id.* 563;

and for the form of the commission, *id.* 564; and the oaths to be administered to the witnesses, commissioners, and their clerks, *id.* 567, 8: and see *Append. to Tidd Prac.* 9 Ed. Chap. XXXV. § 15 to 20.

day of — instant, (*or next*,) why a commission, on the part of the defendant, should not issue, to examine witnesses in *France*; and that the trial of this cause may be stayed, until the return of the commission, upon notice of this rule to be given to the plaintiff's attorney or agent. CH. XXXV.

By the Court.

Rose.

—, the } On reading the rule of the — day of — last, (§ 11.)
 — day } and the *affidavit* of *G. H.*, and hearing Mr. — for Rule absolute
 of —. } the plaintiff, and Mr. — for the defendant; ordered, thereon.
Ante, 164, 5.
 that the commission, on the part of the defendant, do issue, to examine witnesses in *France*; and that the trial of this cause be stayed, until the return of the commission.

By the Court.

William the Fourth, &c. (262.) To —, (*naming the Commissioners*,) greeting: Know ye, that we, in confidence of your prudence and fidelity, have appointed you, and by these presents do give unto you, any two or more of you, full power and authority, diligently to examine the witnesses, upon certain interrogatories to be exhibited to them, as well on the part of *A. B.* plaintiff, as on the part of *C. D.* defendant, in an action on promises, (*or debt, &c. as the case may be*,) now depending between them, in our court before us (*in K. B.*; *or, in C. P.* “before our justices,” *or, in the Exchequer*, “before the barons of our Exchequer”) at *Westminster*: And therefore we command you, any two or more of you, that on or before the — day of — now next ensuing, at a certain day and place, or certain days and places, to be appointed by you for that purpose, you cause the said witnesses to come before you at *Paris*; and then and there examine each of them apart, upon the said interrogatories, on their respective corporal oath, first taken before any two or more of you, according to the form of their several religions; and that you do take such their examinations, and reduce them into writing, on paper or parchment: and when you shall have so taken them, you are to send the same, without delay, to our said court before us, (*in K. B.*; *or, in C. P.*, “before our

(§ 12.)
 Commission for
 examining wit-
 nesses abroad,
 out of the juris-
 diction of the
 court^a.
Ante, 162, 164,
 5.
 Chapm. K. B.
 242.

^a This commission, it will be observed, is similar to that in *Tidd Prac.* 9 Ed. Chap. XXXV. § 17, except that, instead of prescribing a particular form of oath, to be taken by the witnesses, commissioners, and clerks, it requires them to take an oath, according to the form of their several religions.

CH. XXXV. said justices," or, in the *Exchequer*, "before the barons of our said *Exchequer*,") at *Westminster*, closed up, under your seals, or the seals of any two or more of you, distinctly and plainly set, together with the said interrogatories, and this writ, to be filed of record in the office of —, the clerk of the rules (in *K. B. or Exchequer* ; or, in *C. P.* "in the secondaries office,") of the same court : And we further command you, and every of you, that before you act in, or be present at the swearing or examining of any witness, or witnesses, you take an oath, according to the form of your several religions, that you will, according to the best of your skill and knowledge, truly and faithfully, and without partiality to any or either of the parties, take the examination and deposition of all and every witness and witnesses, produced and examined by virtue of this writ, upon the interrogatories produced and left with you : and we give you, any two or more of you, full power and authority, jointly or severally, to administer such oath to the rest, or any other of you. And we further command, that all and every the clerk or clerks, employed in taking, writing, transcribing, or engrossing the deposition or depositions of witnesses, to be examined by virtue hereof, shall, before he or they be permitted to act as clerk or clerks as aforesaid, severally take an oath, truly, faithfully, and without partiality to any or either of the parties in the cause, to take and write down, transcribe, and ingross, the deposition of all and every witness and witnesses, produced before and examined by the said commissioners, or any of them, as far forth as he or they are directed and employed by the said commissioners, or any of them, to take down, write, or ingross the said depositions ; which oath, any two or more of you are hereby empowered to administer to such clerk or clerks, according to his or their several religions. And we further command, that previous to the execution of this commission, which is granted by us at the instance of the said plaintiff, (or "defendant",) and by him prosecuted, the said — and —, commissioners who have been named, approved, and appointed, on behalf of the plaintiff and defendant, shall give, or cause to be given, *two days'* notice in writing of such execution of this commission, under their respective hands, to the said — and — respectively, commissioners who have been named, approved of, and appointed, on behalf of the plaintiff and defendant, by delivering such notice to the said — and — personally, or by leaving the same for them or him, at their or his then respective place or places of abode ; and in and by

such notice shall state the place, day and hour, whereat and **Cm. XXXV.** wherein this commission shall be executed. Witness, &c. (263.)

(If the opposite party refuse to name commissioners, or join in the commission, this latter clause may be omitted.)

CHAP. XXXIX.

CERTIFICATES *for* IMMEDIATE EXECUTION, *after* VERDICT *or* NONSUIT, &c.

I hereby certify, that, in my opinion, execution ought to issue in this action forthwith, (*or*, "on the — day of — instant, *or* next.") Dated the — day of — 18—.

— (Judge's, *or* Baron's name.)

(§ 1.)
Judge's certificate, on back of record, that execution ought to issue forthwith, &c.

Ante, 175.

I hereby certify, that, in my opinion, execution ought to issue, &c. (*as in last*.) for the whole of the sum (*or*, "for —^l part of the sum") found by the verdict. Dated, &c. (*as in last*.)

(§ 1. a.)
The like, after verdict for plaintiff, for the whole, or part of sum recovered.

(*After the entry of the verdict, or nonsuit, proceed as follows:*)

And the said chief justice (*or*, "chief baron", *or*, "the said justice, *or* baron") did, before the end of the sittings (*or* "assizes") at which the said issue (*or* issues) was (*or* were) tried, according to the form of the statute in such case made and provided, certify under his hand, on the back of the record, that, in his opinion, execution ought to issue in the said action forthwith, &c. (*as in the certificate*.) Therefore, &c.

(§ 2.)
Entry thereof, as part of *postea*.
Ante, 176.

* If the execution is to be subject to be expressed in the certificate. any condition or qualification, it should

CHAP. XLI.

RULES of COURT, for RELIEF of SHERIFF, &c. on
INTERPLEADER ACT, 1 & 2 W. IV. c. 58. § 6;
and ENTRIES thereof on RECORD, &c.

(§ 1.)

Rule nisi, on
claim of goods
by assignees of
bankrupt.

Ante, 189. 191.

In the King's Bench.

— the — day of —, &c. (267.)

B. } Upon reading the *affidavit* of E. F. It is ordered, that the
D. } plaintiff, upon notice of this rule, to be given to his attorney,
and Messrs. — and —, in the said *affidavit* named, upon
notice of this rule to be given to their attorney, shall, upon —,
the — day of — instant, (*or next*,) shew cause, why, upon
payment into court, by the sheriff of the county, of —, of the
money arising from the execution under the writ of *feri facias* issued
in this cause, all proceedings against the said sheriff should not be
stayed, until the further order of this court; and why such order
should not be made, touching the proceeds of the said execution,
as this court shall think fit, pursuant to the statute of the 1st and
2d of his present Majesty, chapter 58; and that in the mean time,
proceedings be stayed. Upon the motion of Mr. —.

By the Court.

(§ 2.)

Rule absolute
thereon, that the
money be paid
into court, with
liberty for the
assignees to
bring an action
against plaintiff.

Ante, 189. 191.

B. } Upon reading the rule made in this cause, on — the —
D. } day of: — instant, the *affidavit* of the defendant, the *affidavit*
of E. F. and the paper writing thereto annexed, and upon hearing
Mr. — of counsel for the plaintiff, Mr. —, of counsel for
Messrs. — and —, in the said rule named, and Mr. —, of
counsel for the sheriff of the county of —; It is ordered, that
the said sheriff do pay into court the money arising from the ex-
ecution, under the writ of *feri facias* issued in this cause; and that
all further proceedings against the said sheriff be stayed, until the
further order of this court; and the money to remain in court,
until further order of the court: And it is further ordered, that the
assignees of the defendant, under the commission of bankruptcy
against him, be at liberty to bring an action against the plaintiff

in this cause, for the purpose of trying the title to the proceeds of the said execution. CHAP. XLI.

By the Court.

B. — D. } Upon reading the three several rules made in these
 F.—same. } causes respectively, on — the — day of —
 H.—same. } in this term, the three several *affidavits* of G. H. made
 in the said three causes respectively, the two several *affidavits* of
 I. K. gentleman, made in the two last-named causes, and upon
 hearing Mr. Serjeant —, of counsel for the plaintiffs in the first-
 named cause, Mr. —, of counsel for the plaintiff in the second-
 named cause, Mr. —, of counsel for the plaintiff in the third-
 named cause, Mr. —, of counsel for — and — in the said
 three rules named, and Mr. —, of counsel for the sheriff of the
 county of —; It is ordered, that the goods seized in execution
 in these causes be sold, and the produce thereof vested in Ex-
 chequer bills; and that such Exchequer bills be lodged in the
 banking house of —, in the joint names of Mr. —, of
 —, a trustee named on the part of the plaintiffs in the
 first and second-mentioned causes, Mr. —, of —, a
 trustee named on the part of the said — and —, and
 Mr. —, of —, a trustee named on the part of the plain-
 tiff in the last-named cause: And it is further ordered, that the
 validity of the mortgage deed from the defendant to the said
 Messrs. — and —, and the extent of the claims of the said
 mortgagees, be tried in the county of —, on one or more feigned
 issues, wherein the said — and — shall be plaintiffs, and the
 plaintiffs in the last above-named cause shall be the defendants;
 and that the plaintiffs in the other causes above-named shall be at
 liberty to attend the said trial; and that they be bound by the ver-
 dict and judgment on the said issue or issues to be tried: And it
 is further ordered, that the funds so deposited in the names of the
 said trustees, remain in the hands of the said bankers, to abide the
 further direction of this court; and that the expences of the said sale
 be a charge on the said fund, without prejudice to the sheriff's claim
 to poundage, if any; the said sheriff to be reimbursed any *extra* ex-
 pences which he may incur, under the authority of the parties; and
 that any further expences be in the discretion of this court: And it
 is further ordered, that every facility shall be given to the said sheriff,
 to effect such sale; that he shall be at liberty to sell either at —
 or —, or both, and to employ such auctioneers as he shall think

(§ 3.)
 Rule absolute,
 on a claim by
 mortgagees, that
 the goods be
 sold, and the
 produce vested
 in Exchequer
 bills, and the
 question of pro-
 perty tried on a
 feigned issue,
 &c.

Ante, 189. 191.

CHAP. XLI. fit: And it is further ordered, that the said sheriff shall receive all the monies arising from the sale, and be authorized to enquire and state to the court, when called upon, what part of the property, now at —, was there at the date of the said mortgage, if he find that he can make the enquiry satisfactorily.

By the Court.

(§ 4.)
Rule nisi, on a claim by landlord for rent.
Ante, 189, &c.

B. } Upon reading the *affidavit* of C. D., and the declaration in D. } this cause; It is ordered, that the plaintiff, upon notice of this rule, to be given to his attorney, and E. F. in the said *affidavit* named, upon notice of this rule, to be given to him or his attorney, shall, upon the — day of — next, shew cause, why the said E. F. should not appear before this court, and state the nature and particulars of his claim, and maintain or relinquish the same; or why the court should not make such order, respecting the same, as to them shall seem fit, pursuant to the statute of the 1st and 2nd years of his present Majesty, chapter 58. Upon the motion of Mr. —.

By the Court.

(§ 5.)
Rule absolute thereon, that the landlord be barred of his claim against the sheriff, reserving his right against the plaintiff.
Ante, 189, &c.

B. } Upon reading the rule made in this cause, on — the — D. } day of — in this term, and upon hearing Mr. —, of counsel for E. F. in the said rule named, and Mr. —, of counsel for the plaintiff and defendant; It is ordered, that the said E. F. and all persons claiming by, from, and under him, be barred from prosecuting his and their claim against the defendant, his executors and administrators, for the rent claimed in this action; saving nevertheless the right of the said E. F. against the plaintiff.

By the Court.

(§ 6.)
Rule nisi, upon a claim of the proceeds of goods by the assignee of defendant, after action brought by him against the sheriff.
Ante, 189. 191.

B. assignee, &c. } Upon reading the *affidavit* of —, gentleman, D. late sheriff, &c. } man, It is ordered, that the plaintiff, and E. F. (*the execution creditor*), in the said *affidavit* named, upon notice of this rule, to be given to their respective attorneys, shall, upon —, the — day of — instant, (*or next*), shew cause, why they the said plaintiff and E. F. should not appear before this court, and state the nature and particulars of their respective claims to the proceeds of the goods and chattels seized by the defendant, under the writ of *feri facias* in the said *affidavit* mentioned, and maintain or relinquish the same; and why the court should not make such order, respecting the same, as to it shall seem fit, pursuant

to the statute of the 1st and 2nd years of his present Majesty, CHAP. XLI.
chapter 58; and that in the mean time, proceedings be stayed.
Upon the motion of Mr. —.

By the Court.

B. assignee, &c. } Upon reading the rule made in this cause, on
D. late sheriff, &c. } — the — day of — in this term, the
affidavit of —, the *affidavit* of the plaintiff, (*the assignee,*) and
upon hearing Mr. —, of counsel for the plaintiff, and Mr. —,
of counsel for the defendant, (*the sheriff,*) and no cause being
shewn to the contrary, by *E. F. (the execution creditor,*) in the said
rule named; It is ordered, that the said *E. F.* be barred of his
claim to the proceeds of the execution, issued against *G. H. (the*
defendant in the execution,) at the suit of the said *E. F.*; and that
the money paid into court, by the defendant in this action, in the
cause of *E. F.* against *G. H.* in respect of the said execution, be
forthwith paid out of court, to the plaintiff or his attorney; and
that the said defendant do also pay over to the plaintiff, the sum
retained by him for poundage, in respect thereof: And it is re-
ferred to the master, to tax the plaintiff his costs of this applica-
tion; which costs, when taxed, shall be paid by the said *E. F.* to
the plaintiff, or his attorney.

(§ 7.)
Rule absolute
thereon, on non-
appearance of
execution cre-
ditor, that he be
barred of his
claim, and the
money paid out
of court to the
assignee, with
the costs of the
application.

Ante, 189. 191.

By the Court.

As yet of — term, (*the term in, or as of, which the*
entry is made,) in the — year of the reign of King
William the Fourth. Witness Sir *Thomas Denman*
Knight.

(§ 8.)
Entry of two
last rules on
record, in K. B.
after declaration.
Ante, 192. 3.

Ellenborough.

— day of —, &c. (306.)

—, to wit. (*Venue.*) *A. B.* assignee of *G. H.* a bankrupt, ac-
cording to the force, form, and effect of the statute concerning
bankrupts, by —, his attorney, complains of *C. D.* late sheriff
of the county of —, who has been summoned to answer the said
A. B. in an action on the case: For that whereas, &c. (*here*
copy the declaration to the end, proceeding as follows:) And such
proceedings were thereupon had, that afterwards, to wit, on —,
the — day of —, in the — year of the reign of our lord
the now king, a certain rule or order was made in the said cause,
upon the application of the said *C. D.*, in and by the court of

CHAP. XLI. our said lord the king, before the king himself, upon reading the *affidavit* of —, gentleman; whereby it was ordered, that the plaintiff and *E. F.* in the said *affidavit* named, upon notice of that rule to be given to their respective attornies, should, upon —, the — day of — then instant, (*or next*,) shew cause, why they the said plaintiff and *E. F.* should not appear before that court, and state the nature and particulars of their respective claims to the proceeds of the goods and chattels seized by the defendant, under the writ of *feri facias* in the said *affidavit* mentioned, and maintain or relinquish the same; and why the court should not make such order, respecting the same, as to it should seem fit, pursuant to the statute of the 1st and 2d years of his present Majesty, chapter 58; and that in the mean time, proceedings should be stayed. And such further proceedings were thereupon had, that afterwards, to wit, on — the — day of —, in the — year aforesaid, a certain other rule or order was made, in and by the said court of our said lord the king, before the king himself, upon reading the rule made in that cause, on —, the — day of — then last, the *affidavit* of —, the *affidavit* of the plaintiff, (*the assignee*,) and upon hearing Mr. —, of counsel for the plaintiff, and Mr. —, of counsel for the defendant, (*the sheriff*,) and no cause being shewn to the contrary, by the said *E. F.* in the said first mentioned rule named; whereby it was ordered, that the said *E. F.* should be barred of his claim to the proceeds of the execution issued against *G. H.* at the suit of the said *E. F.*; and that the money paid into court by the defendant in that action, in the cause of *E. F.* against *G. H.*, in respect of the said execution, should be forthwith paid out of court, to the plaintiff or his attorney; and that the said defendant should also pay over to the plaintiff, the sum retained by him for poundage, in respect thereof; and it was referred to the master, to tax the plaintiff his costs of that application; which costs, when taxed, should be paid by the said *E. F.* to the plaintiff, or his attorney; and which costs were afterwards, to wit, on the — day of — in this same term, taxed on the said last mentioned rule, by the master of the same court, and amounted to the sum of —*l.*, as appears by the master's *allocator* on the said last mentioned rule. And thereupon the said several rules or orders, at the prayer of the said *A. B.*, are respectively entered of record in the same court here, according to the form of the statute in such case made and provided.

Entered of record, the —
day of —
18—.

As yet of — term, &c. (325.)

—, to wit. (*County into which the writ of summons issued against the sheriff.*) *C. D.* late sheriff of the county of — was, on the — day of —, in the year of our Lord 18—, (*day of service of the writ of summons,*) summoned to answer *A. B.* assignee of *G. H.* a bankrupt, according to the force, form, and effect of the statute concerning bankrupts, in an action on the case, for the recovery of the value of certain goods and chattels, seized and taken by the said *C. D.* as such sheriff, under a writ of *feri facias* issued against *G. H.* (*the defendant in the execution,*) at the suit of *E. F.* (*the execution creditor,*) and which were claimed by him the said *E. F.*: And such proceedings were thereupon had, &c. (*as in last.*)

(§ 9.)
The like, before
declaration.
Ante, 192, 3.

William the Fourth, &c. (262.) To the sheriff of —, greeting:
We command you, that of the goods and chattels of *E. F.* in your bailiwick, you cause to be made —*l.*, being the amount of the taxed costs of a certain application made by the late sheriff of the county of —, to our court before us, in a certain cause lately depending in the same court, wherein *A. B.* assignee, (&c.) was plaintiff, and *C. D.* late sheriff, (&c.) was defendant: which costs were ordered, by a rule of the same court, to be paid by the said *E. F.* to the plaintiff, or his attorney, pursuant to the statute in such case made and provided; as appears to us of record.* And have that money before us at *Westminster*, on the — day of — next, to be rendered to the said *A. B.* for his costs aforesaid; and have there then this writ. Witness, &c. (263.)

(§ 10.)
Fieri facias, for
the costs of ap-
plication.
Ante, 193.

William the Fourth, &c. (262.) To the sheriff of —, greeting:
We command you, that you take *E. F.* if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us at *Westminster*, on the — day of — next, to satisfy *A. B.* of —*l.* &c. (*as in last, to the asterisk;*) and have there then this writ. Witness, &c. (263.)

(§ 11.)
*Capias ad satis-
faciendum*, for
same.
Ante, 193.

CHAP. XLV.

FORMS of PROCEEDINGS in EJECTMENT.

(§ 1.)
Declaration in
ejectment, by
original^a, in K.
B. or C. P.
Ante, 196, 7.

In the King's Bench, (or
Common Pleas.)

— term, in the — year of the reign of King
William the Fourth.^b

—, (to wit.) *Richard Roe* was attached to answer *John Doe* of a plea of trespass and ejectment: And thereupon the said *John Doe*, by — his attorney, complains; that whereas *A. B.* on the — day of —, in the — year of the reign of our lord the now king, in the county of —, had demised to the said *John Doe*, — messuages, — barns, — stables, — outhouses, — yards, — gardens, — orchards, — acres of arable land, — acres of meadow land, and — acres of pasture land, with the appurtenances, situate and being in the parish of —, in the county aforesaid; to have and to hold the same to the said *John Doe* and his assigns, from the — day of —, then last past, for and during, and unto the full end and term of — years, from thence next ensuing, and fully to be complete and ended: By virtue of which said demise, the said *John Doe* entered into the said tenements with the appurtenances, and became and was thereof possessed, for the said term so to him thereof granted: And the said *John Doe* being so thereof possessed, the said *Richard Roe* afterwards, to wit, on the — day of —, in the — year aforesaid, with force and arms, &c. entered into the said tenements with the appurtenances, which the said *A. B.* had demised to the said *John Doe*, in manner and for the term aforesaid, which is not yet expired, and ejected him the said *John Doe* from his said farm: and other

^a For the forms of declarations in ejectment by bill, in K. B. or Exchequer, which still remain unaltered, see Append. to Tidd *Prac.* 9 Ed. Chap. XLVI. § 26, 7.

^b If the tenancy expired, or right of entry accrued, in or after an issuable

term, the declaration should be entitled as follows: "—, the — day of —", (*the day next after the day of the demise.*) "in the — year of the reign of King *William the Fourth.*" *Ante*, 195.

wrongs to the said *John Doe* then and there did, against the peace of our said lord the now king, and to the damage of the said *John Doe* of ——. and therefore he brings his suit, &c. CHAP. XLV.

Mr. C. D.

I am informed that you are in possession of, or claim title to the premises, in this declaration of ejectment mentioned, or some part thereof; and I, being sued in this action as a casual ejector only, and having no claim or title to the same, do advise you to appear and plead to the said declaration, within *ten* days from the service hereof, in his majesty's court of King's Bench, wheresoever his said majesty shall then be in *England*, (or, in *C. P.* "in his majesty's court of Common Bench at *Westminster*," or, in the *Exchequer*, "in the office of Pleas of his majesty's court of Exchequer at *Westminster*,") by some attorney of that court; otherwise I shall suffer judgment therein to be entered against me by default, and you will be turned out of possession. Dated this — day of — 18—.

(§ 2.)
Notice to appear and plead to declaration in ejectment, on stat. 11 Geo. IV. & 1 W. IV. c. 70. § 36.

Your's &c.

Richard Roe.

In the King's Bench, &c. (265.)

John Doe, on the demise
of *A. B.* plaintiff,
and
C. D. . . . defendant.

(§ 3.)
Affidavit of service of declaration and notice, on same statute, when tenancy expires in or after *Hilary* or *Trinity* term. *Tidd Prac.* 9 Ed. 1209.

E. F. of —, maketh oath and saith, that the right of entry of the lessor of the plaintiff above-named, accrued, as this deponent verily believes, on the — day of — last, being after the expiration of — term last past; the tenancy of *C. D.*, tenant in possession of the premises in the declaration of ejectment hereunto annexed mentioned, of and in the premises for the recovery of the possession of which this action is brought, having expired on the — day of the said month of — last: And this deponent further saith, that he did, on the — day of — instant, personally serve the said *C. D.* with a true copy of the said declaration, and of the notice thereunder written, hereunto annexed; and that he this deponent acquainted the said *C. D.* with the intent and meaning of the said declaration and notice.

Sworn, (&c.)

E. F.

In making up the record of the proceedings, on a declaration by *original* in the King's Bench or Common Pleas, or in the Ex-

(§ 4.)
Making up the record, on same statute, § 37.

Tidd *Prac.* 9
Ed. 1236.

chequer, on the statute 11 Geo. IV. & 1 W. IV. c. 70, where the tenancy expires, or right of entry accrues, in or after *Hilary* or *Trinity* term, the special title should be prefixed to the declaration, (*as before*, p. 328. *b.*) In the King's Bench by *bill*, it should be introduced in the *memorandum*, which precedes the bill, as follows :

—— (to wit.) Be it remembered, that on —— the —— day of ——, (*the day next after the day of the demise in the declaration*.) in the —— year of the reign of our lord the now king, *John Doe* brought into the office of the clerk of the declarations of the court of our said lord the king, before the king himself, according to the form of the statute in such case made and provided, his certain bill against *C. D.* being in the custody of the marshal of the marshalsea of our said lord the king, before the king himself, of a plea of trespass and ejectment ; and filed the same bill in the said office : which said bill was and is entitled on the said day of ——, in the —— year aforesaid, and follows in the words, (*that is to say*) : —— (to wit.) *John Doe* complains of *C. D.* being, &c. (*as in the Appendix to Tidd Prac. 9 Ed. Chap. XLVI. § 26.*)

(§ 5.)
Judge's certificate for immediate writ of possession.

Tidd *Prac.* 9
Ed. 1224. 1244,
&c.

I do hereby certify my opinion, that a writ of possession ought to be issued immediately in this cause.

—— Chief justice's (*or Judge's name.*)

(§ 6.)
Affidavit to induce a judge to certify for immediate writ of possession, where plaintiff is nonsuited, for defendant's not confessing lease, &c.

Tidd *Prac.* 9
Ed. 1224. 1244,
&c.

In the King's Bench, &c. (265.)

John Doe, on the demise, &c. (§. 3.)

A. B. of ——, the lessor of the plaintiff above named, maketh oath and saith, that this action of ejectment was brought for the recovery of the possession of a dwelling house with the appurtenances, of him this deponent, situate, (&c.) and lately held by the said *C. D.* as his tenant thereof, for a term of years, which expired on the —— day of —— last : And this deponent further saith, that after the expiration of the said term, he this deponent demanded possession of the said dwelling house with the appurtenances, and required the said defendant to deliver the same to him this deponent ; but that the said *C. D.* wholly refused to deliver such possession, and wrongfully held over, and continued, and still continues, in possession of the said dwelling house with the appurtenances, to the great injury and detriment of this deponent : And this deponent further saith, that previously to the expiration of the said term, he this deponent had agreed to let the said dwelling

house with the appurtenances to another tenant, and give him possession thereof on the day after the expiration of the said term, but that he was unable to do so, by reason of the said defendant's having so held over, and continued in possession of the same as aforesaid^a.

Sworn, (&c.)

A. B.

(*To the end of the postea, and then as follows :*)

And thereupon the said chief justice, (*or "chief baron", or "the said justice, or baron,"*) before whom the said issue was tried, certified his opinion, on the back of the record, that a writ of possession ought to issue immediately, for the recovery of the said term (*or "several terms"*) yet to come, of and in the tenements aforesaid, with the appurtenances. Therefore, &c.

(§ 7.)
Entry of certificate, on record.
Tidd *Prac.* 9
Ed. 1224, 1244,
&c.

^a This affidavit will, of course, vary according to circumstances; but its general object, as will be seen by the above form, is to shew, that there was no real ground for defending the ejectment; and (*if the fact,*) that the lessor of the plaintiff will suffer some particular loss or inconvenience, by being kept out of possession.

ADDENDA.

REGULÆ GENERALES.

HILARY TERM, 4 WILLIAM IV.—1834.

IT IS ORDERED, that from and after the first day of *Easter* term next, inclusive, the following rules shall be in force, in the Courts of King's Bench, Common Pleas, and Exchequer of Pleas, and Courts of Error in the Exchequer Chamber^a.

DEMURRERS, &c.

1. No demurrer, nor any pleading subsequent to the declaration, shall in any case be filed with any officer of the court, but the same shall always be delivered between the parties^b.

Demurrers, and pleadings, not to be filed.

2. In the margin of every demurrer, before it is signed by counsel, some matter of law intended to be argued, shall be stated; and if any demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside as irregular, by the court or a judge, and leave may be given to sign judgment as for want of a plea^c. Provided, that the party demurring may, at the

Statement to be made in margin of demurrer, and consequence of omission.

^a These rules, which chiefly relate to *demurrers*, and the proceedings thereon, the law and practice of *error*, and the verification of *documents*, appear to have been made by the judges, in exercise of the powers given them by the *Administration of Justice Act*, (11 Geo. IV. & 1 W. IV. c. 70. § 11. 1 Sup. to Tidd *Prac.* 9 Ed. 1. 195.) and *Law Amendment Act*, (3 & 4 W. IV. c. 42. § 15. *Ante*, 167, 8. 234.) And their general objects are to expedite the proceedings, and prevent unnecessary delay and expense to the parties.

similar to those suggested by the Common law Commissioners, in their third Report, pp. 27, 8. 77, 8. And for the practice of the courts, as to *demurrers*, before the making of these rules, see Tidd *Prac.* 9 Ed. Chap. XXIX., and as to arguing demurrers, *id.* Chap. XXXI.

^c This rule is calculated to prevent the delay which formerly arose from the defendant's putting in a frivolous or sham demurrer to the declaration, or replication, &c. towards the end of the term, or in vacation, and by that means hindering the plaintiff from getting judgment till the next term.

^b This, and the six following rules, are

No rule to join
in demurrer.

Nor signature
of counsel to
joinder.

Issue and de-
murrer book, by
whom made up.

No motion or
rule for a *con-*
cilium.

Setting down
demurrers, &c.
for argument.

Delivery of
copies of de-
murrer book,
special case, or
special verdict,
to judges.

Statement to be
made in margin
of plea of judg-
ment recovered
in another court,
and consequence
of omission.

time of the argument, insist upon any further matters of law, of which notice shall have been given to the court, in the usual way.

3. No rule for joinder in demurrer shall be required; but the party demurring may demand a joinder in demurrer, and the opposite party shall be bound, within *four* days after such demand, to deliver the same, otherwise judgment.

4. To a joinder in demurrer, no signature of a serjeant or other counsel shall be necessary, nor any fee allowed in respect thereof.

5. The issue, or demurrer book, shall on all occasions be made up by the suitor, his attorney or agent, as the case may be, and not, as heretofore, by any officer of the court.

6. No motion or rule for a *concilium* shall be required; but demurrers, as well as all special cases, and special verdicts, shall be set down for argument, at the request of either party, with the clerk of the rules in the King's Bench and Exchequer, and a secondary in the Common Pleas, upon payment of a fee of *one* shilling; and notice thereof shall be given forthwith, by such party, to the opposite party.

7. Four clear days before the day appointed for argument, the plaintiff shall deliver copies of the demurrer book, special case, or special verdict, to the lord chief justice of the King's Bench or Common Pleas, or lord chief baron, as the case may be, and the *senior* judge of the court in which the action is brought; and the defendant shall deliver copies to the other two judges of the court, next in seniority; and in default thereof by either party, the other party may, on the day following, deliver such copies as ought to have been so delivered by the party making default; and the party making default shall not be heard, until he shall have paid for such copies, or deposited with the clerk of the rules in the King's Bench and Exchequer, or the secondary in the Common Pleas, as the case may be, a sufficient sum to pay for such copies.

8. Where a defendant shall plead a plea of judgment recovered in another court, he shall, in the margin of such plea, state the date of such judgment, and, if such judgment shall be in a court of record, the number of the roll on which such proceedings are entered, if any; and in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea: and in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer, or person having the custody of the records or proceedings of the court where such judgment is

alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea, by leave of the court, or a judge^a.

WRITS OF ERROR, &c.

9. No writ of error shall be a *supersedeas* of execution, until service of the notice of the allowance thereof, containing a statement of some particular ground of error, intended to be argued: Provided, that if the error stated in such notice, shall appear to be frivolous, the court, or a judge upon summons, may order execution to issue^b.

Writ of error, when not a *supersedeas*.

10. No rule to certify or transcribe the record shall be necessary; but the plaintiff in error shall, within *twenty* days after the allowance of the writ of error, get the transcript prepared and examined with the clerk of the errors of the court in which the judgment is given, and pay the transcript money to him; in default whereof, the defendant in error, his executors or administrators, shall be at liberty to sign judgment of *non pros*. The clerk of the errors shall, after payment of the transcript money, deliver the writ of error, when returnable, with the transcript annexed, to the clerk of the errors of the court of error.

No rule to certify or transcribe the record.

Transcript when to be made, and delivered to clerk of the errors.

^a This rule is intended to prevent the defendant from delaying the plaintiff, by pleading a plea of judgment recovered in another court, towards the end of the term, or in vacation; in which case, as a rule to produce the record could not be given, the trial was necessarily postponed, till the next term. Where a judgment in the same court is pleaded, the party pleading it must, on demand, give a note in writing of the term and number roll, whereon such judgment is entered and filed, or in default thereof, the plea is not to be received. Tidd *Prac.* 9 Ed. 587. 742, 8.

^b This, and the seven following rules, appear to have been made with a view to the regulations proposed by the Common law Commissioners, in their third Report, pp. 35, 6. 79, 80.; and for the law and practice of error, before the

making of these rules, see Tidd *Prac.* 9 Ed. Chap. XLIV. It is observable, that the 9th and 10th rules do not seem to be applicable to writs of error *coram nobis*, or *coram vobis*. These writs of error are allowed in open court; and the rule of allowance being drawn up by the clerk of the rules in the King's Bench, or secondaries in the Common Pleas, a copy of it is served on the attorney for the defendant in error: (Tidd *Prac.* 9 Ed. 1144.) and they are, or are not a *supersedeas* of execution, according to circumstances; as to which see *id.* 1154. And the proceedings on these writs of error being in the same court, and entered on the same roll as the original judgment, or former writ of error, it is not necessary to certify or transcribe the record thereon. *Id.* 1158. 1175.

No rule to allege diminution, or assign errors, nor *scire facias quare executionem non*.

Errors when to be assigned.

Assignment of errors, &c. to be delivered.

No *scire facias ad audiendum errores*.

Joinder in error, &c. when to be delivered.

Time allowed for proceedings in error, when it does not expire before 10th August.

Vide ante, 101.

Scire facias to terretenants.

Setting down case for argument of issue in law, and proceedings thereon.

11. No rule to allege diminution^a, nor rule to assign errors^a, nor *scire facias quare executionem non*^a, shall be necessary, in order to compel an assignment of errors; but, within *eight* days after the writ of error, with the transcript annexed, shall have been delivered to the clerk of the errors of the court of error, or to the signer of the writs in the King's Bench, in cases of error to that court, or within *twenty* days after the allowance of the writ of error, in cases of error *coram nobis* or *coram vobis*, the plaintiff in error shall assign errors; and in failure to assign errors, the defendant in error, his executors or administrators, shall be entitled to sign judgment of *non pros*.

12. The assignment of errors, and subsequent pleadings thereon, shall be delivered to the attorney of the opposite party, and not filed with any officer of the court.

13. No *scire facias ad audiendum errores*^b shall be necessary, (unless in case of a change of parties;) but the plaintiff in error may demand a joinder in error^b, or plea to the assignment of errors; and the defendant in error, his executors or administrators, shall be bound, within *twenty* days after such demand, to deliver a joinder, or plea, or to demur, otherwise the judgment shall be reversed.

Provided, that if in any case the time allowed as herein before mentioned for getting the transcript prepared and examined, for assigning errors, or for delivering a joinder in error, or plea or demurrer, shall not have expired before the 10th day of *August* in any year, the party entitled to such time, shall have the like time, for the same purpose, after the 24th day of *October*, without reckoning any of the days before the 10th of *August*. Provided also, that in all cases, such time may be extended by a judge's order.

Provided also, that in all cases of writs of error to reverse fines and common recoveries, a *scire facias* to the terretenants shall issue, as heretofore.

14. When issue in law is joined, either party may set down the case for argument, with the clerk of the errors of the court of error, or the clerk of the rules in the King's Bench, as the case

^a As to the rule to allege diminution, and assign errors, see Tidd *Prac.* 9 Ed. 1167, 8. And as to the *scire facias quare executionem non*, see *id.* 1165.

^b As to the *scire facias ad audiendum errores*, see Tidd *Prac.* 9 Ed. 1172; and as to the joinder in error, *id.* 1175.

may require, and forthwith give notice in writing thereof to the other party, and proceed to argument, in like manner as on a demurrer, without any rule or motion for a *concilium*.

15. Four clear days before the day appointed for argument, the plaintiff in error shall deliver copies of the judgment of the court below, and of the assignment of errors, and of the pleadings thereon, to the judges of the King's Bench, on writs of error from the Common Pleas or Exchequer, and to the judges of the Common Pleas, on writs of error from the King's Bench; and the defendant in error shall deliver copies thereof, to the other judges of the court of Exchequer chamber, before whom the case is to be heard; and in default by either party, the other party may deliver such books as ought to have been delivered by the party making default; and the party making default shall not be heard, until he shall have paid for such copies, or deposited with the clerk of the errors, or the clerk of the rules in the King's Bench, as the case may be, a sufficient sum to pay for such copies.

Delivery of copies of judgment, &c. to judges.

16. No entry on record of the proceedings in error shall be necessary, before setting down the case for argument; but after judgment shall have been given in the court of errors in the Exchequer Chamber, either party shall be at liberty to enter the proceedings in error, on the judgment roll, remaining in the court below, on a certificate of a clerk of the errors of the Exchequer Chamber, of the judgment given, for which a fee of 3s. 4d., and no more, shall be charged.

Entry of proceedings on record.

NOTICE OF TAXING COSTS, &c.

17. Notice of taxing costs shall not be necessary in any case, where the defendant has not appeared, in person or by his attorney or guardian, notwithstanding the general rule of *Trinity Term*, 1 W. IV. § 12^a.

Notice of taxing costs unnecessary, when defendant has not appeared.

18. It shall not be necessary to repass any *nisi prius* record, which shall have been once passed, and upon which the fees of

When not necessary to repass *nisi prius* record. Tidd Prac. 9 Ed. 917, 18.

^a 2 Sup. to Tidd Prac. 9 Ed. 86. This rule, by which it was ordered, that "before taxation of costs, one day's notice should be given to the opposite party," was holden to apply to those cases only, in which a notice of taxation

of costs was necessary. (*Griffiths v. Liversedge*, 2 Dowl. Rep. 143. 6 Leg. Obs. 206. S. C. per *Patteson, J.*) And now, by the above rule, it is confined to cases where the defendant has appeared.

Teste and return of *distringas*, &c.

Tidd *Prac.* 9 Ed. 781.

passing shall have been paid: And if it shall be necessary to amend the day of the *teste* and return of the *distringas*, or *habeas corpora*, or of the clause of *nisi prius*, the same may be done by the order of a judge, obtained on an application *ex parte*.

Writs of trial.

19. Writs of trial shall be sealed only, and not signed ^a.

VERIFICATION OF DOCUMENTS.

Either party may give notice of his intention to adduce in evidence written or printed documents.

Proceedings thereon.

20. Either party, after plea pleaded, and a reasonable time before trial, may give notice to the other, either in town or country, in the form hereto annexed, marked (A.) or to the like effect, of his intention to adduce in evidence, certain written or printed documents; and unless the adverse party shall consent, by indorsement on such notice, within *forty-eight* hours, to make the admission specified, the party requiring such admission may call on the party required, by summons, to shew cause before a judge, why he should not consent to such admission; or in case of refusal, be subject to pay the costs of proof: and unless the party required shall expressly consent to make such admission, the judge shall, if he think the application reasonable, make an order, that the costs of proving any document specified in the notice, which shall be proved at the trial to the satisfaction of the judge, or other presiding officer, certified by his indorsement thereon, shall be paid by the party so required, whatever may be the result of the cause. Provided, that if the judge shall think the application unreasonable, he shall indorse the summons accordingly ^b.

Provided also, that the judge may give such time for inquiry, or examination of the documents intended to be offered in evidence, and give such directions for inspection and examination, and impose such terms upon the party requiring the admission, as he shall think fit.

If the party required shall consent to the admission, the judge shall order the same to be made.

^a As to the writ of trial, *vide ante*, 152; and see *id.* 154, as to the signing, sealing, and issuing of such writ.

^b This rule was made by the judges, in exercise of the authority given them by the Law Amendment Act, 3 & 4

W. IV. c. 42. § 15, (*ante*, 167, 8. 234); and appears to have been framed with a view to the regulations proposed by the Common Law Commissioners, in their second Report, pp. 19. 67, 8, 9; and see 2 Sup. to Tidd *Prac.* 9 Ed. 62, 3.

No costs of proving any written or printed document shall be allowed to any party, who shall have adduced the same in evidence on any trial, unless he shall have given such notice as aforesaid, and the adverse party shall have refused or neglected to make such admission, or the judge shall have indorsed upon the summons, that he does not think it reasonable to require it.

Costs of proving written or printed documents, when not allowed.

A judge may make such order as he may think fit, respecting the costs of the application, and the costs of the production and inspection; and, in the absence of a special order, the same shall be costs in the cause. Costs of application, &c.

**Costs of appli-
cation, &c.**

[Signed by all the Judges.]

FORM OF NOTICE REFERRED TO *.

A.

In the K. B.

C. P.

A. B. v. C. D.

or Exchequer.

Take notice, that the { plaintiff
defendant } in this cause proposes to
adduce in evidence the several documents hereunder specified,
and that the same may be inspected by the { defendant
plaintiff } his at-
torney or agent, at —, on —, between the hours of —,
and that the { defendant
plaintiff } will be required to admit that
such of the said documents as are specified to be originals, were
respectively written, signed, or executed, as they purport respec-
tively to have been; that such as are specified as copies, are true
copies; and such documents as are stated to have been served,
sent, or delivered, were so served, sent, or delivered respectively,
saving all just exceptions to the admissibility of all such docu-
ments as evidence in this cause. Dated, &c.

**G. H. attorney for { plaintiff
defendant. }**

To *E. F.* attorney or agent for { defendant }
 { plaintiff. }

(Here describe the documents, the manner of doing which may be as follows:)

* This notice is similar to that in 2 Rep. C. L. Com. 69, 70.

ADDENDA.

ORIGINALS.

Description of the Documents.	Date.
Deed of Covenant, between <i>A. B.</i> and <i>C. D.</i> } 1st part, and <i>E. F.</i> 2d part.	1st January, 1828.
Indenture of Lease, from <i>A. B.</i> to <i>C. D.</i>	1st February, 1828.
Indenture of Release, between <i>A. B. C. D.</i> } 1st part, &c.	2d February, 1828.
Letter, defendant to plaintiff.	1st March, 1828.
Policy of Insurance on goods, by ship <i>Isabella</i> , on voyage from Oporto to London.	3d December, 1827.
Memorandum of Agreement, between <i>C. D.</i> , captain of said ship, and <i>E. F.</i>	1st January, 1828.
Bill of Exchange for £100, at three months, drawn by <i>A. B.</i> on and accepted by <i>C. D.</i> indorsed by <i>E. F.</i> and <i>G. H.</i>	1st May, 1829.

COPIES.

Description of Documents.	Date.	Original or duplicate served, sent, or de- livered, when, how, and by whom.
Register of Baptism of <i>A. B.</i> in the parish of <i>X.</i>	1st January, 1808.	
Letter, plaintiff to de- fendant.	1st February, 1828.	{ Sent by General Post, 2d February, 1828.
Notice to produce Papers, 1st March, 1828.		{ Served 2d March, 1828, on defend- ant's attorney, by <i>E. F.</i> of —.
Record of a Judgment of the court of King's Bench, in an action, <i>I. S. v. I. N.</i>	{ Trinity Term, 10 Geo. IV.	
Letters Patent of King Charles the 2d, in the Rolls Chapel.	1st January, 1680.	

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FINIS.





